No. 85-1851

Supreme Court, U.S.
FILED
MAY 9 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT
OF THE UNITED STATES

LAIL JOHNSON,

Petitioner,

V.

THE STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEAL OF THE STATE
OF CALIFORNIA, FIFTH APPELLATE
DISTRICT

PETITION FOR WRIT OF CERTIORARI

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1691P

QUESTION PRESENTED

Do law enforcement authorities become overinvolved in their activities in detecting crime, and thus violate principles of due process of law, by employing a convicted, but not yet sentenced, criminal on twelve separate occasions over a two month period, (1) to solicit and obtain money from Petitioner to be used to pay employees to embezzle the property of their employers; (2) to solicit and actively participate in the actual embezzlement of the property by the employees and to pay the employees for their illegal acts with the money furnished by Petitioner; and (3) to deliver and sell the embezzled property to innocent and unsuspecting third-party buyers who in turn pay Petitioner for that property?

PARTIES IN COURT BELOW

The parties involved in the proceedings before the Court of Appeal of the State of California, Fifth Appellate

District, in this matter were the People of the State of California, Petitioner Lail Johnson and co-defendants Jerry Towery and Joe Tony Samora.

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CITATIONS TO OPINION

The citations to the opinion filed by the Court of Appeal of the State of California, Fifth Appellate District, in this matter, are as follows:

Official Citation: People v. Towery (1985) 174 Cal.App.3d 1114.

Unofficial Citation: People v. Towery (1985) 220 Cal.Rptr. 475.

JURISDICTIONAL STATEMENT

The opinion of the Court of Appeal of the State of California, Fifth Appellate District, Case Number F002863, review of which is sought in this Petition, was filed on November 25, 1985. A full and complete text of that opinion is attached hereto in Appendix "A".

An order modifying the opinion and denying rehearing was filed by the Court of Appeal of the State of California, Fifth Appellate District, Case Number F002863, on December 24, 1985. A full and

complete text of this modification and order is attached hereto in Appendix "B".

A petition for review of the opinion of the Court of Appeal of the State of California, Fifth Appellate District, Case Number F002863, was timely filed in the Supreme Court of the State of California. An order denying review by the Supreme Court of the State of California was filed in connection with this matter on March 12, 1986. A full and complete text of that order is attached hereto in Appendix "C".

Pursuant to 28 U.S.C. section 1257, subdivision (c), this Court, by writ of certiorari, has jurisdiction to review the opinion of the Court of Appeal of the State of California, Fifth Appellate District, Case Number F002863.

CONSTITUTIONAL PROVISION INVOLVED

Fourteenth Amendment of the United States Constitution, Section 1, second sentence: "No State shall make or enforce

any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On April 15, 1982, Petitioner Lail Johnson was charged in an information filed in the Superior Court of Kern County, State of California, with twelve counts of grand theft, twelve counts of receiving stolen property and one count conspiracy. On May 4, 1983, the jury returned verdicts finding Petitioner not guilty of the twelve counts of grand theft, but guilty of the twelve counts of receiving stolen property and the one count of conspiracy. The trial court granted Petitioner's motion for a new trial on the conspiracy conviction; however, once Petitioner was sentenced on the remaining twelve convictions for receiving stolen property, the trial court granted the prosecution's motion to dismiss the conspiracy charge.

At all times pertinent to this matter, Petitioner was part owner in, and the manager of, a large trucking and hauling

business known as Johnson Brothers Trucking Company which was based in Bakersfield, Kern County, California.

In June 1981, Charles Conroy, a truck driver who had driven trucks for Johnson Brothers Trucking Company, was arrested on two felony charges of unlawfully taking a vehicle and two felony charges of grand theft. On September 18, 1981, Conroy was convicted of all four of the charges against him. At that time Conroy was driving trucks for Johnson Brothers Trucking Company on a part time basis. When Conroy was convicted of the charges against him, he advised Petitioner of that fact. Shortly, thereafter, Petitioner and Conroy vaguely discussed the subject of fuel oil.

A few days later, Conroy met with his trial attorney and talked about the fact that as a result of his convictions he was facing four years in state prison; in fact, the recommendation of the probation

officer in Conroy's case was a four year state prison sentence. Thereafter, on September 28, 1981, pursuant to an appointment arranged by his attorney, Conroy and his attorney went to the Kern County Sheriff's Department and met with Sergeant Larry Congdon and Lieutenant William Shell. On the advice of his attorney, Conroy disclosed to these two law enforcement officers all of the illegal activities in which he had been involved. The meeting lasted for 30 to 45 minutes, and at the conclusion thereof no promises were made, nor were any understandings reached.

About a week later, on October 5, 1981, Conroy and his attorney again met with Sergeant Congdon and Lieutenant Shell; also present at this meeting was Kern County Deputy District Attorney Steven Davis. Again, Conroy disclosed all of his criminal activities that occurred prior to his arrest in June 1981. At the

conclusion of this meeting an agreement was reached whereby Conroy would work with the Kern County Sheriff's Department; in exchange therefor Deputy District Attorney Davis personally promised Conroy that he would not be prosecuted for any of his past criminal acts, which included approximately 100 oil thefts; additionally, Deputy District Attorney Davis agreed that he would talk to Conroy's sentencing judge, go to "bat" for him and make a recommendation to the sentencing judge, all in an effort to try to get Conroy's sentence reduced from the recommended four years in state prison to only one year in the county jail.

In connection with his work with the Sheriff's Department, Conroy was instructed by Sergeant Congdon to go out, to act normal and to allow people to contact him about buying stolen petroleum products.

On or about November 19, 1981,

Petitioner and the undercover agent Conroy engaged in a telephone conversation that was initiated by Conroy in which they discussed the possibility of acquiring fuel oil that was "not legit" and making $1,200.00 a load. At the suggestion of Conroy they also discussed the possibility of having one Charles Norris use his truck to pull Petitioner's 42 1/2 foot trailer tank which would be used to transport the fuel oil.

On November 25, 1981, Joe Samora, a truck driver for Mock Petroleum Company, telephoned Conroy and offered to sell to Conroy a load of fuel oil he would be hauling for his employer later that night. The agreed price was $1,000.00; they also agreed to transfer the fuel oil from Samora truck's to another truck to be obtained by Conroy, at a spot near the Bonanza Cafe in San Pedro, California. Conroy called Petitioner and asked for the necessary money; the undercover agent Con-

roy then went to Petitioner's truck yard in Bakersfield and took a tank truck belonging to Petitioner. A short time later Conroy and Petitioner met, and Petitioner gave Conroy $2,500.00 in cash.

Conroy then proceeded to the Bonanza Cafe in San Pedro and met Samora; Conroy gave Samora $1,000.00 of the money that Petitioner earlier had given him. At a spot near the Bonanza Cafe, Samora proceeded to pump the fuel oil off from his truck and onto the truck brought by Conroy. During this pumping off process, which was monitored by the police who were parked nearby, the pump broke and the undercover agent Conroy received only a partial load of fuel oil. Conroy then drove the truck he had back to Petitioner's yard in Bakersfield and left it there. This incident was the basis of Petitioner's first of twelve convictions for receiving stolen property.

During the late evening hours of

November 27, 1981, and the early morning hours of November 28, 1981, Samora and the undercover agent Conroy met at Petitioner's truck yard in Bakersfield; Samora brought with him another truck load of fuel oil that he was hauling for his employer and at that time some of his fuel oil was pumped off into Petitioner's truck. Later, on November 28, 1981, Conroy drove Petitioner's truck to a British Petroleum depot in San Pedro and delivered the fuel oil to that company using a bill of lading from Petitioner's company. This incident was the basis of Petitioner's second of twelve convictions for receiving stolen property.

On November 29, 1981, the undercover agent Conroy talked to Charles Norris and enlisted Norris' assistance as a truck driver; Norris was to use his truck to pull the 42 1/2 foot trailer tank that belonged to Petitioner which would carry the fuel oil that was to be pumped off

from other trucks.

On December 5, 1981, arrangements were made between Conroy and Samora to meet Samora at the spot near the Bonanza Cafe in San Pedro to pump off a load of fuel oil Samora was transporting for his employer. This time Charles Norris' assistance was enlisted. Conroy met Norris at Petitioner's truck yard in Bakersfield; Norris provided his own truck which he hooked up to Petitioner's 42 1/2 trailer tank. Norris then drove the truck and trailer to the Bonanza Cafe; the undercover agent Conroy followed in his car. They met Samora at the Cafe, and they then proceeded to pump the fuel oil off from Samora's truck and onto Norris' truck. Conroy paid Samora $1,000.00 for the fuel oil; Conroy paid Norris $400.00 for his efforts. Again, as in all of the transactions, this opertion was monitored by the police who were parked nearby. Conroy and Norris then went to the British

Petroleum depot that was nearby and delivered the fuel oil to that company, using a bill of lading from Petitioner's company; they then returned to Bakersfield. This incident was the basis of Petitioner's third of twelve convictions for receiving stolen property.

On December 6, 1981, Richard Land, who also was a truck driver for the Mock Petroleum Company, contacted Conroy and offered to sell a load of fuel oil that he would be hauling for his employer. Conroy explained that Petitioner was out of town and that he (Conroy) was out of money; however, arrangements were made to pump off Land's truck that night and for Land to be paid later. The undercover agent Conroy then contacted Norris and arrangements were made to meet Land at the Bonanza Cafe. Later that night, Conroy and Norris met Land at the Bonanza Cafe and the fuel oil on Land's truck was pumped off onto Norris' truck. Conroy and

Norris then went to the British Petroleum depot and delivered the fuel oil on Norris' truck. This incident, which was also monitored by the police, was the basis of Petitioner's fourth of twelve convictions for receiving stolen property.

On December 7, 1981, the undercover agent Conroy met Petitioner at Petitioner's truck yard in Bakersfield. Later that same day, Conroy paid Land $1,000.00 for the fuel oil pumped off the night before; Conroy paid Norris $400.00 for his efforts of the previous night.

On December 8, 1981, Samora called Conroy wanting to deliver another load of fuel oil. Conroy explained that there would be no more purchases until a new pump off location could be found by Norris.

On December 9, 1981, Conroy talked with Norris on the telephone and explained that they could not make any more trips until Norris located a new pump off spot.

On December 10, 1981, the undercover agent Conroy and Norris went to the Los Angeles area and made arrangements for a new pump off spot at a truck wash operated by a man named Woody.

On December 11, 1981, Land called Conroy and explained that he had another load of fuel oil to sell. The undercover agent Conroy then made all of the necessary arrangements for Norris and himself to meet Land at the new pump off spot at the truck wash. Later that night Conroy, Norris, Land and Woody met at the truck wash and the fuel oil on Land's truck was pumped off onto the truck being driven by Norris. Again, these events were monitored by the police who were parked nearby. Conroy paid Land $1,000.00, paid Norris $400.00 and paid Woody $100.00. Norris, by himself, then delivered the fuel oil to the British Petroleum depot. This incident was the basis of Petitioner's fifth of twelve convictions for receiving stolen

property.

On December 17, 1981, Conroy, Samora and Land made arrangements to have Conroy take two half loads of fuel oil from Samora and two half loads of fuel oil from Land. Later that night the undercover agent Conroy arrived at the truck wash first, followed by Norris with the truck pulling Petitioner's 42 1/2 foot trailer tank. Land then arrived and half a load of fuel oil was pumped off from Land's truck onto Norris' truck; Samora arrived and half a load of fuel oil was pumped off from his truck onto Norris' truck, thus giving Norris a full load of fuel oil. Norris then delivered his load of fuel oil to the British Petroleum depot. Several hours later the same procedure was repeated. All of these events were monitored by the police who were parked nearby. A few days later Conroy paid Land $1,000.00, paid Samora $1,000.00, paid Norris $800.00 and paid Woody $200.00.

This incident was the basis of Petitioner's sixth and seventh of twelve convictions for receiving stolen property.

On December 25, 1981, arrangements were made between Conroy and Samora to have Samora sell a truck load of fuel oil to Conroy which Samora was hauling for his employer. During the early morning hours of December 26, 1981, the undercover agent Conroy and Norris met Samora at the truck wash and Samora pumped off his load of fuel oil onto Norris' truck. Conroy paid Norris $400.00 that night and paid Samora the standard $1,000.00 a couple of days later. This incident which was also monitored by the police who were parked nearby was the basis of Petitioner's eighth of twelve convictions for receiving stolen property.

On December 28, 1981, Conroy and Samora were talking on the telephone and Samora at Conroy's suggestion agreed that in the near future he would deliver a load

of fuel oil to Conroy for free since Conroy owed some money to Petitioner; in this way the undercover agent Conroy could repay the debt to Petitioner from the $1,000.00 that would be saved in not having to pay Samora for a load of fuel oil.

Later that same day, December 28, 1981, Conroy and Norris met Land at the truck wash where Land pumped off a load of fuel oil onto the truck that Norris was driving. At that time Conroy paid Land $1,000.00 and paid Norris $400.00. This incident, which was monitored by the police parked nearby, was the basis of Petitioner's ninth of twelve convictions for receiving stolen property.

On December 31, 1981, Conroy and Norris again met Land at the truck wash and again Land pumped off a load of fuel oil from his truck onto Norris' truck; at that time Land explained that Samora was trying to obtain a load of fuel oil to bring to

Conroy in a few hours. Norris then delivered the fuel oil he had in his truck to the British Petroleum depot and returned to the truck wash to wait for Samora. A couple of hours later Samora showed up with a truck load of fuel oil which was pumped off from Samora's truck and onto Norris' truck. Norris then delivered this load of fuel oil to the British Petroleum depot. Again, these events were monitored by the police who were parked nearby. Thereafter, Conroy paid Land $1,000.00 for his load of fuel oil and paid Norris $800.00 for the handling of the two loads of fuel oil; however, pursuant to the earlier understanding between Conroy and Samora for Samora to supply a free load of fuel oil, Samora was not paid for the load of fuel oil he supplied on December 31, 1981. This incident was the basis of Petitioner's tenth and eleventh of twelve convictions for receiving stolen property.

On January 4, 1982, Jerry Towery, another truck driver for Mock Petroleum Company, called Conroy and offered to sell a load of fuel oil that he was going to haul for his employer. The undercover agent Conroy then made all of the necessary arrangements for Towery, Norris and himself to meet at the truck wash that afternoon. At about 3:30 P.M. that day all three of these men met at the truck wash and the load of fuel oil on Towery's truck was pumped off onto Norris' truck. These events were monitored by the poilce who were parked nearby. On the next day, Conroy paid Towery $1,000.00 and paid Norris $400.00. This incident was the basis of Petitioner's twelfth of twelve convictions for receiving stolen property.

Also, on January 4, 1982, at Conroy's suggestion, Conroy and Norris discussed the need to find a new pump off spot. Within a few days Conroy, Norris and Woody found a new place to pump off at a tire

shop that was about five blocks from the truck wash.

However, this new spot was never used since Petitioner, Norris and the various truck driver's were arrested shortly thereafter.

The undercover agent Conroy testified that all of the money he used to purchase the stolen fuel oil came from Petitioner. Conroy, a convicted, but yet sentenced felon, also testified that before any of the truck drivers ever contacted him, Petitioner had agreed to front the necessary money to buy the fuel oil.

Pursuant to standard California Appellate practice, the issue of whether the police involvement in this case violated principles of due process of law was properly raised by Petitioner for the first time in his opening brief filed in the Court of Appeal of the State of California, Fifth Appellate District. This argument was fully discussed on its

merits and was turned down by the Court of Appeal in part "II" of its Opinion entitled, "Government Conduct". (See Appendix A, pp. 41-53.) The issue was properly raised at the appellate level for the firstr time since all of the facts pertinent to that issue were raised in the trial court by way of the defense of entrapment which was fully litigated at the trial court level and was rejected by the jury after appropriate instructions on that defense. (See Appendix A, pp. 41-42.)

REASONS FOR GRANTING WRIT

In United States v. Russell (1973) 411 U.S. 423, 431-432 [36 L.Ed.2d 366], this court rejected a defendant's claim of entrapment, but observed that ". . . we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial

processes to obtain a conviction . . . ."

In Hampton v. United States (1976) 425 U.S. 484, 495, and fn. 7 on p. 495 [48 L.Ed.2d 113], Justice Powell in his concurring opinion recognized that under appropriate circumstances due process principles could bar a conviction when police overinvolvement in crime reached a demonstrable level of outrageousness.

From the cases discussing the concept of police overinvolvement being a violation of due process of law, certain basic principles can be gleaned. (See, e.g., United States v. Twigg (3d Cir. 1978) 588 F.2d 373, 376-381; Greene v. United States (9th Cir. 1971) 454 F.2d 783, 786-787; United States v. Batres-Santolino (N.D. Cal. 1981) 521 F.Supp. 744, 750-752; People v. Isaacson (1978) 406 N.Y.S.2d 714, 718-710.)

Initially, the type of police misconduct which mandates the barring of a criminal prosecution is not limited to

situations involving police brutality.

Secondly, there is no precise line of demarcation as to whether due process principles have been transgressed in a particular factual frame; each case must be decided on its own facts.

Thirdly, all components of the complained of misconduct must be scrutinized, but certain aspects of the action are likely to be indicative. Factors to be considered are: (1) whether the police manufactured a crime which otherwise would not likely have occurred, or merely involved themselves in an ongoing criminal activity; (2) whether the police themselves engaged in criminal or improper conduct repugnant to a sense of justice; (3) whether the police initiated the criminality and lured the defendant into a conspiracy; (4) whether the defendant was reluctant to commit the crime and his reluctance was overcome by overbearing conduct; and (5) whether the facts reveal

simply a desire on the part of the police to obtain a conviction with no motive to prevent further crime or to protect the public. Furthermore, no one of these factors is determinative; each should be viewed in light of the totality of the circumstances.

Lastly, the complained of misconduct must be judged in the context of proper law enforcement objectives, that is, ". . . the prevention of crime and the apprehension of violators, rather than the encouragement of and participation in sheer lawlessness." (People v. Isaacson, supra, 406 N.Y.S.2d 714, 719.)

In the instant case there was absolutely no evidence of any actual or ongoing criminal activity on the part of Petitioner when the police reached an agreement with regard to the services of Conroy, a convicted felon, who was awaiting sentencing. Conroy's sentencing was deliberately postponed, and Conroy was

sent out allegedly to act normally and allow people to contact him about buying stolen petroleum products.

However, shortly thereafter, Petitioner and Conroy, in a telephone conversation initiated by the undercover agent Conroy, talked and the stolen fuel oil operation was set up by Conroy with the full knowledge and consent of the police. According to Conroy, Petitioner would supply the money and Conroy would make it known that he would purchase fuel oil from any truck driver who was willing to embezzle the fuel oil from his employer.

The undercover agent Conroy then made all of the necessary arrangements to have the stolen fuel oil transferred off of the employee's truck and onto a truck Conroy had at the pump-off spot. Additionally, to aggravate this already reprehensible situation, the police knowingly permitted each truck driver that was embezzling his

load of fuel oil to take steps to deceive the depot at which he was suppose to deliver the fuel oil. A driver would go to his intended destination and pretend to pump-off his load of fuel oil at the depot; he would present all the necessary paperwork to the depot so that his employer would get paid, and then the driver would take off from the depot still with his load of fuel oil and deliver it to the undercover agent Conroy. The police knowingly allowed this to continue for a period of about two months, permitted the acts of embezzlement to occur on twelve separate occasions and failed to advise the innocent employers and the innocent depots of what was going on.

Furthermore, after Conroy, with the assistance of Norris, got the fuel oil from the truck drivers, Conroy with the full knowledge and consent of the police, and under the watchful eye of the police, would see that the fuel oil was delivered

to the British Petroleum Company in what would appear to be the normal course of business; the undercover agent Conroy would then see to it that Petitioner got paid for the fuel oil, and the police also failed to advise the British Petroleum Company of what was going on.

In order to allow this operation to go on for about two months, the police knowingly allowed the undercover agent Conroy to continue to obtain money from Petitioner, to attract additional drivers into the scheme and to sell the embezzled fuel oil as legitimate fuel oil.

In every sense of the word the police were "manufacturing" crime on at least twelve separate occasions. The police did not get involved merely in ongoing criminal activity, but knowingly allowed their undercover agent Conroy to start and carry out a course of criminal conduct that lasted for about two months. The police initiated the criminality and lured

Petitioner into the conspiracy. Additionally, the police knowingly allowed innocent fuel depots to pay for fuel oil the depots never received. The police were not content to stop the operation once one act was committed; the police deliberately allowed ten more deliveries to take place, which resulted in ten more times that innocent fuel depots had to pay for fuel oil they never received. The police deliberately allowed this course of criminal conduct to continue for no other apparent reason than to obtain more criminal convictions against Petitioner.

The police were not mere bystanders or observers of the course of criminal conduct. Through their undercover agent Conroy, the police were intentionally manufacturing crime and, by design, were right in the middle of the criminal activity; without the support and the assistance of the police absolutely none of the criminal activity would have occurred.

The police deliberately encouraged and participated in sheer lawlessness. Such conduct cannot be condoned by any society governed by laws. The police generated crime and allowed it to continue for no legitimate purpose. The police obviously were not interested in the prevention of crime or the early apprehension of violators of the law; if they had been, arrests would have been made right after the first completed incident, instead of two months later after ten more deliveries of embezzled fuel oil had taken place.

In summary, the instant case involves a serious misuse by the police of a convicted, but not yet sentenced, undercover agent who had every reason and motive for fabricating Petitioner's involvement in the alleged illegal activities. The police conduct in allowing the undercover operation in question to continue for two months for no other reason than to obtain more convictions against Petitioner

is so outrageous that due process principles require the setting aside of Petitioner's convictions.

CONCLUSION

For the reasons stated above, Petitioner respectfully prays that a petition for writ of certiorari be granted.

Respectfully submitted,

ARTHUR DUDLEY
(Counsel of record)
ROY J. GARGANO
Attorneys for Petitioner

(Appendices follow)

APPENDIX

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II

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

Filed November 25, 1985
Kevin A. Swanson, Clerk

HE PEOPLE,	
	) 5 Crim.
laintiff and Respondent,	) No. F002863
	)
v.	) (Super. Ct.
	) No. 23702)
ERRY TOWERY, et al.,	)
	) OPINION
efendants and Appellants.	)

APPEAL from a judgment of the Superior ourt of Kern County. Henry E. Bianchi, udge. Affirmed.

Nancy Marsh and Eugene F. Toton, under ppointments by the Court of Appeal, ichard M. Long, Smith & Dudley and Arthur udley for Defendants and Appellants.

John K. Van de Kamp, Attorney General, ane N. Kirkland and Shirley A. Nelson

*Pursuant to California Rules of Court, ule 976.1, this opinion is certified for ublication with the exceptions of parts II, V, VI, VII, VIII and IX.

[Footnotes appear at end of Opinion.]

Deputy Attorneys General, for Plaintiff and Respondent.

THE CASE

Six defendants were charged in a 26-count information with conspiracy (Pen. Code, Sec. 182.1)[1/] to commit thefts of oil in Kern County. Defendant Lail Johnson was also charged with 12 counts of grand theft (Sec. 487, subd. 1) and 12 counts of receiving stolen property (Sec. 496). In addition to the conspiracy charge, defendnat Jerry Towery was charged with two counts of grand theft, and defendant Joe Tony Samora was charged with six counts of grand theft. Of the remaining defendants, one pleaded guilty before trial, one was acquitted, and the charges against the third were dismissed; these defendants are not involved in this appeal.

Following a jury trial, defendant Johnson was convicted of conspiracy and 12

counts of receiving stolen property; the jury found him not guilty of the 12 counts of grand theft. Defendant Samora was found not guilty of conspiracy but was convicted of six counts of grand theft. The jury found defendant Towery not guilty of conspiracy but guilty of two counts of grand theft.

The trial court granted defendant Johnson a new trial on the conspiracy charge, and the district attorney later dismissed that count. Defendant Johnson was sentenced to prison for the upper term of three years on one count of receiving stolen property, to consecutive eight-month terms on three other such counts, and the upper term of three years was stayed on the remaining eight counts, resulting in a total term of five years.

Defendant Towery was sentenced to prison for the mid term of two years on one count of grand theft and to two years on the other count, to be served

concurrently. The court sentenced defendant Samora to prison for the mid term of two years on one count of grand theft and to two consecutive eight-month terms on two other such counts; two-year terms on the remaining three counts were stayed, resulting in a total term of three years, four months.

Defendants Johnson, Samora and Towery appeal, alleging the trial court erred (1) in admitting both tape recordings an informant made of his conversations were defendants and evidence of other crimes committed by defendant Johnson; (2) in refusing to dismiss the charges because of the government's outrageous conduct in involving the defendants in the oil theft operations; (3) in instructing the jury and in commenting to jurors when they were deadlocked; (4) in refusing to recuse the district attorney;and (5) in imposing sentence on defendants. We find defendants' contentions without merit and will affirm

would be that of the trial judge. Conroy was also told he would not be prosecuted for the numerous uncharged crimes he had discussed with the police.

Sergeant Condon told Conroy to return to this usual activities and, if contacted anyof his people with whom he had prior dealings or criminal contacts, to tape-record the conversations. Condon instructed Conroy to record "all telephone conversations involving any illegal activities during this period of time and that once that telephone tape was used, to turn it over to [him, Condon] immediately."

In the latter part of 1980, Conroy had obtained, and apparently held at the time of the instant events, a fuel broker's license issued by the State Board of Equalization. Conroy had a company by the name of Fuel Movers. During the oepration with defendant Johnson, Conroy opened a checking account in the name of Fuel

Movers at the request of defendant Johnson to facilitate transferring the large sums of money involved.

Knowing of Conroy's conviction, defendant Johnson approached Conroy about obtaining cheap diesel fuel; Conroy had not brought up the subject prior to Johnsons' inquiry. Through Tommy Gene Shelton, a truck driver for Mock Petroleum, Conroy was introduced to Richard Land. At the same time, Conroy gave Shelton $1,500.00 in cash for a load of diesel fuel; Conroy had obtained the money from Johnson. On October 23, 1981, Conroy and Johnson met and discussed whether Conroy could obtaina load of diesel fuel for Johnson.[3/] Johnson was to pay between $4,000.00 and $4,500.00 for a load of diesel plus a $500.00 commission to Conroy; Conroy was making the arrangements to get the necessary trucking equipment (a "3-axle," a semi cab, and one or more pumps) to transport the fuel. Although Johnson had

a truck capable of carrying the fuel, Johnson and Conroy agreed they did not want to use Johnson's truck since it was too well known. Johnson told Conroy he was using his own money for the diesel deal since he did not want his wife, who kept the books for Johnson Brothers Trucking, to know anything about it.

In a later phone call on October 23, Conroy and Johnson discussed getting a smaller load as well as using some temporary signs to cover Johnson's name on the Johnson Brothers truck. Johnson told Conroy, "Yeah, do that." In a telephone conversation on October 24, Conroy and Johnson made arrangements for Johnson to deliver an envelope to Conroy which Conroy needed before he could pick up the load of diesel. The envelope Conroy received from Johnson contained $4,000.00 in $100.00 bills.

At no time during this entire

oepration, which continued into January 1982, did Conroy ever succeed in obtaining a load of stolen diesel fuel for Johnson, although Conroy did pick up several loads of diesel from the refinery on Johnson's behalf, paying the full price for each with a Johnson Brothers Co. check. These were legitimate transactions and are not the transactions referred to in any of the recorded telephone conversations.

Although Conroy believed he had two possible sources for stolen diesel fuel, Tommy Shelton and Rony Steele, Jr., the main problem in obtaining the diesel appeared to be one of security, a Johnson. For example, Conroy once told Johnson he had been unable to get the anticipated load of fuel because "the wrong guy" was on the scale, and Conroy stated he would rather be safe than sorry. When Conroy and Johnson discussed a load on October 28, the discussion emcompassed the weight of the truck and the best route to take to

avoid the highway scales.

As early as October 28, Conroy mentioned to Johnson that he, Conroy, might have a deal going for "fuel oil," a heavy, low-grade fuel, also known as bunker fuel. Conroy told Johnson that Roman Oil Co. was a potential purchaser and that Roman Oil was aware "where it's coming from." In a later telephone conversation covering both the possible purchase of two loads of diesel at $4,500.00 per load and the transfer of one load of fuel oil to Roman Oil, Johnson asked Conroy if the fuel oil deal was "legit." When Conroy replied it was not, defendant asked Conroy why he didn't get some legitimate deals going. Johnson asked, "Is there a chance of gettin (sic) tail in a ringer (sic)?" In this same conversation, Conroy and Johnson discussed using a truck belonging to codefendant Charles Norris. Norris owed Johnson some money, and the tone of the conversation suggested Conroy should use

this debt to compel Norris to permit the use of his truck.

On November 22, 1981, Conroy received a phone call from defendant Joe Tony Samora. Samora told Conroy he worked for Mock Petroleum and offered to sell Conroy a load of fuel oil. The two engaged in considerable discussion about being careful; additionally, Conroy asked Samora if Samora knew anyone hauling diesel, and the tone of the conversation indicated interest in a stolen load. Conroy and Samora also discussed other drivers who might be stealing oil. In a telephone conversation three days later, Samora told Conroy of his interest in stealing a load of fuel oil since he needed money for federal taxes.

At Johnson's request, Conroy got a price quotation from British Petroleum for the purchase of fuel oil. Conroy relayed this information to Johnson, and they also talked about "pumping off" a load of fuel

oil from a Mock Petroleum truck. Again, the tone of the conversation suggested an illegal objective.

Conroy and Samora later made arrangements by telephone to meet at the Bonanza Cafe and transfer a load of stolen fuel oil from a Mock Petroleum truck, driven by Samora, to a truck supplied by Conroy. Conroy and Samora described themselves to each other prior to the meeting. Conroy then called the police and had himself fitted with a Fargo unit. He also called Johnson to arrange to get the money to buy the load. Johnson gave Conroy $2,500 in $100 bills. Conroy drove a Johnson Brothers truck, No. 857, and had the truck weighed empty, a "light weight" of 26,960 pounds. Conroy and Samora met at the Bonanza Coffee Shop, connected their trucks, and began to pump oil from Samora's Mock Petroleum truck into the Johnson Brothers truck. At one point when Samora went back into the cafe to buy a

cup of coffee, Conroy said to the policeman monitoring his conversation with Samora, "'We got it, we got it, we got it, we got it, Goddamn I been waitin' for this day' [Sic.] You guys had me worried fellas [portion of tape deleted by trial court at pretrial hearing]." However, during the pumping off process, the pump broke, and Conroy was not able to get all of the load from Samora's truck. When weighed again on the return trip to Bakersfield, Johnson Brothers truck No. 857 had a "heavy weight" of 33,850 pounds.

The procedure Conroy ultimately developed involved, for the most part, Charlie Norris using his own truck to haul a 42-foot trailer belonging to Johnson. Norris would stop at a scale and get a light weight on the rig, then meet with Conroy and a Mock Petroleum driver and transfer a load of stolen fuel oil from the Mock Petroleum truck to the Johnson trailer. Norris would then obtain from

Conroy a bill of lading with defendant Johnson's name at the top and get a heavy weight on the truck. Norris would finally deliver the load of fuel oil to British Petroleum, who would then pay Johnson per the bill of lading. Three drivers employed by Mock Petroleum were involved, Joe Tony Samora, Richard Land, and, in January 1982, Jerry Towery, known as Rollie. Grand theft charges wsere filed against each of them. Towery's nickname had come up in conversations between Conroy and Samora in early December, But Conroy and Towery did not make an actual transfer until January. The Mock Petroleum driver would receive $1,000 for the load of fuel oil, Charlie Norris would be paid $400, and Conroy would ostensibly keep $500 for arranging the transaction, although Conroy actually turned this money over to the sheriff's department. Conroy also managed to keep one carbon of all the paperwork involved, which was also turned

over to Sergeant Condon.

Frequently in the conversations between Conroy and the Mock Petroleum drivers, there was talk of the need to be very careful in stealing the fuel oil and in not stealing too much. It appeared from some conversations that other drivers, not connected with Conroy, were also stealing fuel oil, and while losses of 1,000 to 2,000 gallons might be written off by the refineries as clerical errors, serious discrepancies in excess of that amount would arouse suspicion. Moreover, when Conroy talked to Johnson in December 1981, Johnson again stressed to Conroy the desirability of getting some "legit" loads. However, Conroy testified that between October 1981 and January 1982 he never purchased any legitimate fuel oil on behalf of Johnson from the refineries, and the only fuel oil obtained was from the Mock Petroleum drivers. Conroy obtained no stolen fuel oil after January 11, 1982.

DISCUSSION

I. Tape Recordings of Informant's Conversations With Defendants.

All defendants contend that the trial court erred in ruling admissible the telephone tape recordings and the recordings monitored by Fargo unit between Conroy and them. Defendants challenge the admissibility of these tape recordings on three bases: (A) Conroy's consent to the recording was not voluntary, (B) Conroy was not acting under the direction of law enforcement agencies; and (C) the trial court erred in ruling the tapes admissible under the coconspirator exception to the hearsay rule.

A. Informant's consent.

None of the defendants in this case dispute the well-established rule that a tape recording of a conversation between a criminal defendant and a third party made with the voluntary consent of the third party is admissible in a criminal

proceeding. (See, e.g., People v. Murphy (1972) 8 Cal.3d 349, 359-361; People v. Fulton (1984) 155 Cal.App.3d 91, 100, fn. 6; People v. Blend (1981) 121 Cal.App.3d 215, 229.)4/ Defendants nonetheless contend the tape recordings in this case were erroneously admitted since Conroy's consent was coerced. Defendant Johnson had challenged the admissibility of the tape recordings by a section 1538.5 motion in the trial court on this same ground. In denying that motion, the trial court stated in part: "Mr. Conroy's consent was free and voluntary. He approached the police and the District Attorney's Office, not the other way around. Although Mr. Conroy was undoubtedly highly motivated, this did not tarnish his free and voluntary consent to be an informant. Promises were made but no pressure was applied by the police."

Defendants contend that Conroy's interest in avoiding a four-year prison

sentence, and in gaining immunity from prosecution for other, similar acts with which he was not charged at the time he agreed to cooperate with the police, rendered his consent to cooperate involuntary. However, as this court recently pointed out in People v. Blend, supra, 121 Cal.App.3d at page 229, "[c]ooperation was not'coerced' merely because Gray, the informant, found it to be in her own best interests to cooperate with those enforcing the law. [Citation omitted.]" Similarly, the court in People v. Velasquez (1976) 54 Cal.App.3d 695, 699, rejected an argument that consent to monitor and record telephone conversations was involuntary, holding that, "[w]hether the custody [of the witness] operated as a compulsion was a matter of fact for the trial court to resolve; its determination of that issue is binding on us. The only promise made to Miss Caico was that the officer would advise enforcement personnel

and the courts of her assistance; no promise that she would receive immunity or favorable sentencing was made. The promise was not such as, as a matter of law, must be held coercive."

Defendants urge that the quoted language of the court in People v. Velasquez, supra, implicitly requires a determination of coercion, as a matter of law, when a promise of leniency in sentencing or immunity is made. However, in People v. La Peluso (1966) 239 Cal.App.2d 715, 723, the court said with respect to such factors, "This is not to say that such factors would necessarily vitiate consent as a matter of law. A distinction must be drawn between motivation, which may be induced by proper representations, and consent which may then either be freely granted or grudgingly conferred. Where consent is freely granted, the fact that the special employee is under arrest for a narcotic violation and cooperated follow-

ing assurances that the fact of cooperation will be made known to the United States Attorney's office, will not negative that consent. [Citation omitted.]"

Based on the cases reviewed, we conclude that the decision of the trial court on defendant's section 1538.5 motion was correct. As the trial court noted, Conroy, believing himself subject to a prison sentence of up to four years, voluntarily contacted the police, apprised them of the scope of his criminal activity, and offered to cooperate with them in their investigation of oil field thefts. Conroy had himself been on the receiving end of a similar deal, as a result of which Conroy's codefendant went to state prison for four years while the police "agent/informant" was granted immunity from prosecution for 10 to 12 oilfield thefts. (See People v. Kellett, supra, 134 Cal.App.3d at P. 953.)

Admittedly,Conroy was highly motivated

here to strike a deal with the authorities. However, his degree of motivation, high though it might have been, did not operate to divest Conroy of his right to freely and voluntarily consent to help the authorities. The trial court expressly found Conroy freely consented to the recording of telephone conversations and the monitoring and recording of face-to-face conversations. This finding is supported by substantial evidence that Conroy initiated contact with the authorities and offered his cooperation with hope of favorable treatment. (See, e.g., People v. North (1981) 29 Cal.3d 509,513.) We therefore conclude that the trial court properly rejected defendants' argument that Conroy's consent was coerced and involuntary.

B. Acting Under Direction of Law Enforcement Officers.

Defendants also urge that the recorded

conversations should have been excluded pursuant to section 632, subdivision (d), pertaining to eavesdropping on or recording confidential communications. That subdivision provides, "Except as proof in an action or prosecution for violation of this section, no evidence obtained as a result of eavesdropping upon or recording a confidential communication in violation of this section shall be admissible in any judicial, administrative, legislative or other proceeding." Defendants acknowledge an exception to this provisionin section 633:

"Nothing in Section 631 or 632 shall be construed as prohibiting the Attorney General, any district attorney, or any assistant, deputy, or investigator of the Attorney General or any district attorney, or any officer of the California Highway Patrol, or any chief of police, assistant chief of police, or policeman of a city or city and county, or any sheriff, under

sheriff, or deputy sheriff regularly employed and paid as such of a county, or any person acting pursuant to the direction of one of the above-named law enforcement officers acting within the scope of his authority, from overhearing or recording any communication which they could lawfully overhear or record prior to the effective date of this chapter.

"Nothing in Section 631 or 632 shall be construed as rendering inadmissible any evidence obtained by the above-named persons by means of overhearing or recording any communication which they could lawfully overhear or record prior to the effective date of this chapter."

Defendants have not cited and we have not found any case directly discussing the meaning of the phrase in section 633, "pursuant to the direction of one of the above-named law enforcement officers acting within the scope of his authority." In 55 Ops.Cal.Atty.Gen. 151 (1972) the

opinion stated that inspectors for the Bureau of Food and Drug Inspections were not among those listed as "law enforcement officers" in section 633 and thus could only use electronic eavesdropping equipment under the direction of a designated law enforcement officer. The opinion then noted:

"It has also been asked what the phrase 'under the direction' means. While it might be difficult to give a precise statement as to what would amount to 'direction' any problems that might arise can be obviated by simply having one of the officers mentioned in section 633 supervise the eavesdropping operation and specifically direct that the desired electronic device be used." (Id., at p. 154.)

The focus of defendants' challenge goes to the recordings of telephone conversations made by informant Conroy from his home telephone and utilizing his per-

sonal recording equipment. Conroy testified he had the microphone for some eight years prior to the events in question, but the tape recorder he used was a new one, purchased from Radio Shack, when he determined his existing tape recorder was inoperable. He advised Sergeant Condon that he had this equipment. consequently, Condon did not provide him with eavesdropping/recording equipment owned by the police department. Condon did supply Conroy the tapes on which Conroy recorded, and these tapes were turned in to Sergeant Condon on a regular basis, usually within a day of recording and never more than three days from the time the tape was completed. Condon had directed Conroy to record all telephone calls dealing with the subject matter of stolen oil, and Conroy testified that he recorded most of the telephone conversations he received pertinent to the ongoing investigation. Conroy, who maintained the

recording equipment on a telephone in his bedroom, admitted that some conversations dealing with the subject matter were not recorded. These failures to record occurred when someone involved in the thefts was at Conroy's home at the time a call was received.

It is this lack of direct police control over Conroy's recording of which defendants complain, i.e., there was no police officer in Conroy's home when a recording was being made nor was Conroy required to make the phone calls fromn a designated line in the police station. They argue that without such direct supervision Conroy could manipulate the recordings, either by erasing portions of conversations or electing not to record certain conversations altogether. Defendants contend this lack of independent control over the recordings should render them inadmissible. We disagree.

On cross-examination, Sergeant Condon

was questioned about the recording procedure in this case. He testified that one or two of the informants he had used in the past had made phone calls which were either monitored by the police and/or used as evidence in court. In the cross-examination by counsel for defendant Norris, Condon explained why it was neither feasible nor desirable to require Conroy to make all outgoing telephone calls from the offices of the sheriff's department. That cross-examination is set forth in the margin.5/

In People v. Brandow (1970) 12 Cal.App.3d 749, a prostitute agreed to cooperate with the police in a crackdown on criminal pandering, pimping, and prostitution. A police officer furnished her "with a tape recorder and she thereafter regularly recorded the conversations of various individuals who called on her private unlisted telephone line. The was visited almost daily by [that officer] who

reviewed with her the contents of the tape recordings and the events since his last visit." (Id., at p. 752.) The informant succeeded in obtaining 45 identifiable tape recordings. These tape recordings were played in court, while transcripts of the recordings, which had been verified as to accuracy by the witness, were furnished to the jury. In rejecting the defendant's claim that the surreptitious tape recordings constituted an illegal search, the court noted that the Supreme Court recognized the Fourth Amendment does not protect a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it. (Id., at p. 753; see also People v. Caravella (1970) 5 Cal.App.3d 931, 933-934.)

This rationale is equally persuasive in the instant case. Although Sergeant Condon had not furnished defendant the recording equipment, Condon and Conroy

discussed this equipment, and Conroy advised Condon he already possessed the necessary machinery to tape-record telephone conversations. The tapes Conroy used were furnished by the police department and, upon their return, were "punched out" so they could neither be recorded over nor erased. Condon's explanation for permitting defendant to record these conversations from his home telephone is reasonable, i.e., at least some of the people from whom the police expected Conroy to receive calls had had prior dealings with him, and a sudden change in telephone numbere might create suspicion. This is factually similar to the situation in People v. Brandow, supra., 12 Cal.App.3d 749 involving a prostitute with an existing clientele.

We believe the looseness of law enforcement direction to Conroy in making the tape recordings properly goes to the weight given to those recordings and not

their initial admissibility. No counsel was precluded at trial from questioning Conroy or Condon about the manner in which the tapes were made, nor were they precluded from arguing to the jury that Conroy, with his significant motivation in cooperating with the police, might have altered the tapes to further his own interest.

Finally, defendants contend admission of the tape recordings violated their Fifth Amendment right to remain silent as well as their Sixth Amendment right to assistance of counsel. These arguments were rejected by the California Supreme Court in People v. Murphy, supra, 8 Cal.3d 349, and we adoptits rationale. Recording of conversations with defendants under the circumstances of this case does not involve the custodial interrogation with which Miranda v. Arizona (1966) 384 U.S. 436 is concerned. Neither did the recordings in this preindictment setting result

in denial of defendants' right to counsel. (People v. Murphy, supra, at pp. 361-362.

C. Conspirator Exception to Hearsay Rule.

Defendant Johnson urges that the trial court erred in ruling, over a hearsay objection, that the taped conversations between Conroy, defendant Johnson, and the various other codefendants in this case were admissible pursuant to Evidence Code section 1223. That section provides:

"Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if:

"(a) The statement was made by the declarant while participating in a conspiracy to commit a crime or civil wrong and in furtherance of the objective of that conspiracy;

"(b) The statement was made prior to or during the time that the party was participating in that conspiracy; and

"(c) The evidence is offered either

after admission of evidence sufficient to sustain a finding of the facts specified in subdivisions (a) and (b) or, in the court's discretion as to the order of proof, subject to the admission of such evidence."

It is well settled that statements of conconspirators may be admitted pursuant to Evidence Code section 1223 upon a prima facie showing of the conspiracy which may be based on circumstantial evidence tending to show that a conspiracy existed. (See, e.g., People v. Jourdain (1980) 111 Cal.App.3d 396, 405; People v. Lipinski (1976) 65 Cal.App.3d 566, 575.) As the court pointed out in People v. Earnest (1975) 53 Cal.App.3d 734, 741, The Foundational requirement may be met without establishing a conspiracy beyond a reasonable doubt or even by a preponderance of the evidence; only prima facie evidence of the fact if required. [Citation omitted.]" In the pretrial

hearings in this case, the trial court listened to lengthy arguments on this issue and concluded:

"After listening to several days of the facts and the arguments, it is my conclusion there are, under the guidelines, sufficient preliminary facts to establish a conspiracy. That is sufficient under the Evidence Code and the cases to enable the People to proceed in front of a jury with the admission or statements of conspirators or co-conspirators."

Defendant Johnson argues that, since the evidence at trial established each of the defendants talked to Conroy and there was no evidence to indicate the various codefendants talked to one another,6/ Conroy's status as a police agent precluded a conspiracy as a matter of law. Thus, defendant argues, there could be no statements of "coconspirators," and the trial court erred in ruling Conroy's tape recordings admissible under this exception

to the hearsay rule. Defendant Johnson placesgreat reliance upon King v. State (Fla. 1958) 104 So.2d 730, in which the court held in part, "where two or more persons conspire with another who is, unknown to them, a government agent acting in the line of duty, to commit an offense under an agreement and an intention that an essential ingredient of the offense is to be performed by, and only by, such government agent, such persons may not legally be convicted of a conspiracy." (Id., at p. 733.) Even were we to accept that the rationale of King v. State would preclude, as a matter of law, the prima facie showing of conspiracy required to admit statements of coconspirators over a hearsay objection, we are not persuaded that case is controlling on the facts now before us.

Initially, the court in King v. State recognized that "[b]oth an agreement and an intention to commit an offense are

necessary components of the substantive offense of conspiracy." (Id., at p. 732.) The distinction between the agreement and the underlying offense is a critical one in the instant case. In King v. State, supra, the defendants were police officers convicted of conspiring to make book and to maintain a place for the purpose of gambling. The police agent in that case was paid by law enforcement to set up the gambling establishment and instructed to make book; when the officers raided the gambling parlor on an anonymous tip (actually made by the agent), an arrangement was struck for weekly pay-offs to the police officers. Interestingly, the officers had been tried and acquitted for the substantive offinse of accepting unauthorized compensation for the nonperformance of their duty.

Clearly, if the members of an alleged conspiracy intend that an essential ingredient of the substantive offense be

committed by, and only by, a government agent, the conspirators are not legally guilty of conspiracy since the government agent cannot be criminally liable for an offense committed in the performance of his duty. This is the rule of King v. State, supra; it does not apply to the facts of the instant case. Here, defendants Johnson, Samora, and Towery, as well as Charles Norris and Richard Land (charged as conspirators in the original information), were charged with conspiracy to commit grand theft. No essential ingredient of the substantive offense had to be performed by the government agent, Conroy. Since the government's agent was not required to perform any essential ingredient of the offense, the crime of grand theft could be committed, and, in fact, Samora and Towery were properly convicted of committing it.

Nor are we persuaded that the rule of King v. State should be extended to encom-

pass situations like that now before htis court simply because a government agent has been the conduit through which the unlawful agreement has passed. We are mindful of the posture in which this issue is presented to us: since we are only called upon to decide if the trial court properly found a prima facie showing of conspiracy sufficient to admit out-of-court statements over a hearsay objection, defendant Johnson's argument would have us hold that Conroy's involvement vitiates the criminality of this agreement to steal and resell fuel oil as a matter of law.

Since it is unnecessary that the various members of a conspiracy meet or even know each other in order for circumstantial evidence to establish the existence of an agreement, there seems little logical reason to exclude statements made by various persons, all of whom are shown by circumstantial evidence to be participants in a conspiracy to accomplish

a criminal end, simply because these various persons were not speaking to one another but to a third party. As the court pointed out in People v. Lipinski:

"It is likewise well recognized that the very crux of the conspiracy, the evil or corrupt agreement [citations omitted], may be shown also by circumstantial evidence. Thus, it is not necessary to prove that the parties met and actually agreed to persorm the unlawful act or that they had previously arranged a detailed plan for its execution. Rather significantly, the agreement may be inferred from the conduct of the defendants mutually carrying out a common purpose in violation of a penal statute [citations omitted]....[T]he sufficiency of evidence relative to the establishment of a conspiracy must be viewed against the background of the type involved, and '"If there be knowledge by the individual defendant that he is a participant in a

general plan designed to place narcotics in the hands of ultimate users, the courts have held that such persons may be deemed to be regarded as accredited members of the conspiracy."' [Citations omitted.]" (People v. Lipinski, supra, 65 Cal.App.3d at pp. 575-576; see also People v. Morales (1968) 263 Cal.App.2d 368, 376-377.)

The court in People v. Jourdain, supra, 111 Cal.App.3d 396 noted the preliminary facts which the prosecution must establish for the coconspirators exception to the hearsay rule are: (1) the declaration was made by the declarant during his participation in the conspiracy, (2) the declaration was made in furtherance of the conspiracy, and (3) the party against whom the statement is offered was, or would become, a participant in the conspiracy. There is clearly no requirement that a statement must be between the coconspirators to be admissible under this exception. The fact

that Johnson made statements to Conroy but not, so far as the record shows, to Samora, Towery, Norris, or Land, is not determinative so long as the court found a sufficient prima facie showing that Johnson was a participant in a conspiracy, the statements challenged were made during his participation in the conspiracy, and the statements were made in furtherance of the conspiracy.

The fact that a declarant has made a statement to a law enforcement operative, whether undercover officer or informant/agent, does not preclude admissibility of the statement under Evidence Code section 1223 so long as those foundational facts summarized above have been satisfied. The trial court did not err in ruling the recordings fell within a recognized exception to the hearsay rule.

We conclude that the trial court did not err in admitting the tape recorded statements of police informant Conroy with

defendants Johnson, Samora and Towery.

II. Government Conduct.

Both defendant Johnson and defendant Towery argue that the involvement of law enforcement officers with this oil theft operation through the informant, Conroy, was so pervasive that prosecution of these defendants for offenses set up by a government agent denied defendants due process of law. Although defendant Johnson refers to the California law on the defense of entrapment (see, e.g., People v. Barraza (1979) 23 Cal.3d 675, 689-690,7 /it appears from their arguments that these defendants recognize entrapment is a defense which the jury clearly rejected as to both of them. The jury was properly instructed on the defense of entrapment in accordance with People v. Barraza, supra (see, e.g., People v. Arthurlee (1985) 168 Cal.App.3d 246, 250-252) and sought reinstruction on the defense as well as the replay of various

crucial tape recordings. However, even conceding that the jury rejected their entrapment defense, defendants assert this does not preclude them from raising a due process violation based on the outrageousness of the government conduct in connection with the criminal activity.

Defendants rely upon a line of federal authority rooted in United States v. Russell (1973) 411 U.S. 423. There, the United States Supreme Court adopted a subjective test for determination of entrapment, focusing upon the predisposition of the defendant to commit the offense charged. This clearly differs from the objective test employed in California and discussed herein. However, notwithstanding the employment of a subjective test and consequent rejection of Russell's contention that he had been entrapped, Justice Rehnquist writing for the majority noted, "[W]e may some day be presneted with a situation in which the

conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." (Id., at pp. 431-432.)

In Russell the government agent, assigned to locate an illicit methamphetamine laboratory, contacted the defendant and two companions and told them he represented a large organization interested in controlling the illicit drug manufactured in the area. The agent offered to supply the defendant with the chemical phenyl-2-propanone, a chemical necessary in the manufacture of methanphetamine and the chemical most difficult to obtain. In return, the agent insisted he be shown a sample of the drug as well as the laboratory where it was produced. The Supreme Court determined not only that defendant's entrapment defense was properly rejected but that this level of government involvement did not reach the

"outrageousness" necessary to constitute a due process violation. (People v. Russell, supra, at p. 432.)

Similarly, in Hampton v. United States (1976) 425 U.S. 484 the Supreme Court rejected a due process claim based onoutrageous government conduct when a government informant had assisted the defendant in two sales of heroin. Recognizing that the government involvement in Hampton was greater than that of the agent in Russell, the Supreme Court nevertheless held, "[b]ut in each case the Government agents were acting in concert with the defendant, and in each case either the jury found or the defendant conceded that he was predisposed to commit the crime for which he was convicted." (Id., at pp. 489-490.) The court then concluded:

"The limitations of the Due Process Clause of the Fifth Amendment come into play only when the Government activity in question violates some protected right of

the defendant. Here, as we have noted, the police,the Government informant, and the defendant acted in concert with one another. If the result of the governmental activity is to 'implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission . . . ,' [citation omitted], the defendant is protected by the defense of entrapment. If the police engage in illegal activity in concert with a defendant beyond the scope of their duties the remedy lies, not in freeing the equally culpable defendant, but in prosecuting the police under the applicable provisions of state or federal law. [Citation omitted.] But the police conduct here no more deprived defendant of any right secured to him by the United States Constitution than did the police conduct in Russell deprive Russell of any rights." (Id., at pp. 490-491.)

Thus the Supreme Court, while recog-

nizing the possibility of a due process violation requiring reversal of a conviction, has never found facts adequate to justify the result. Defendants point to a number of lower federal court cases in which outrageous government conduct was found; all these cases are factually distinguishable from the instant case. For example, in United States v. Batres-Santolino (N.D.Cal. 1981) 521 F.Supp. 744, there was no indication that either of the defendants "had ever been involved in drug smuggling or distribution or that they were ever involved in criminal activity." (Id., at p. 752.) One of the defendants had to ask the government agent "for tips on how to organize the distribution of the cocaine in the United States. Moreover, no criminal enterprise involving defendants existed until Bryan Thomas' actions prompted them to create one. Finally, the defendants had no organization or ability to smuggle the drugs into the United

States. So again, the government obliged them and arranged that part of the enterprise as well. [Par.] Thus, this is a case in whichthe government supplied all the grugs and defendants were not involved ina drug-related enterprise until the government agent came on the scene." (Ibid.) The court then concluded:

"Prior cases in which government agents have contributed materials, labor, or planning skills in order to infiltrate a criminal enterprise, or have made threats to recalcitrant coconspirators in order to play out their undercover roles, simply are not comparable. This court recognizes that there are few cases in which the outrageous government conduct challenge has prevailed. There are few cases where the government has so clearly exceeded the bounds of permissible law enforcement conduct. Permissible conduct has been described as that which, even with the use of stealth and subterfuge, is

designed to expose illicit traffic, illegal conspiracies, violations or would-be violations of the law and to prevent crime. [Citation omitted.] However, this is not a case where the government is ferreting out ongoing criminal activity. It is a case where the government, through its agent, went about putting persons into the business of crime for the first time." (Ibid.)

Similarly, in United States v. Twigg (3d Cir. 1978) 588 F.2d 373, the government informant, a convicted felon seeking to reduce the severity of his sentence, (1) contacted the defendants and suggested the illegal drug enterprise, (2) arranged for the government to supply much of the equipment and a hard-to-obtain chemical free of cost to the defendants when it was not apparent they could have afforded the initial investment, (3) arranged through the Drug Enforcement Administration to facilitate procurement of other necessary

chemicals and actually purchased all of the supplies, (4) obtained an isolated location for the laboratory at no cost to the defendants, and (5) provided all of the expertise and "know-how" to manufacture the drug. The only "predisposition" manifested by the defendants was their acquiescence in the proposal and the informant's testimony that he had worked with one of the defendants in a similar lab some four years earlier.

In People v. Isaacson (1978) 44 N.Y.2d 511 [406 N.Y.S.2d 714, 378 N.E.2d 78] the defendant, a graduate student and teacher at Pennsylvania State University about to receive his doctorate, was importuned repeatedly by a former student to assist the student in obtaining some cocaine. The student persisted despite the unwillingness of the defendant to furnish the drug, and the defendant testified the informant "cried and sobbed on the phone, relating that he was facing 15 years to

life in Attica [for a drug conviction], that his parents had effectively cast him from the family home, that he was running out of friends, and that was looking for ways to make money to hire a decent lawyer." (Id., at p. 716.) When the defendant finally agreed to sell the informant the drugs, the defendant specified the sale take place in Pennsylvania to avoid the possibility of prosecution under New York's harsh drug laws. With the cooperation of government authorities, the informant tricked the defendant into the State of New York where the sale and subsequent arrest occurred. (See also Greene v. United States (9th Cir. 1971) 454 F.2d 783, 786-787.)

Under the authities reviewed, the facts of this case do not support a finding that the government agents planted the seeds for criminal activity in completely innocent minds. Neither was the government's involvement in the criminal

activity so pervasive as to render prosecution of the defendants otherwise violative of due process. It certainly appears from the record, as well as the published opinion in People v. Kellett, supra, 134 Cal.App.3d 949 that oilfield thefts in Kern County were an ongoing problem and one about which law enforcement authorities were seriously concerned. Sergeant Condon testified he was in charge of a specific unit directed to this offense. In making his offer of cooperation to the police, Conroy indicated to them he had been involved in as many as 100 prior thefts before he was arrested and convicted as discussed above, up to 45 of which had also involved defendant Johnson. Returning Conroy to the environment from which his conviction had effectively removed him with instructions to let it be known he was back in the business is hardly the equivalent of government agents suggesting crime, contributing

material, labor or skills to facilitate crime, or coercing reluctant participants to cooperate in their efforts.

In the first taped conversation between Conroy and defendant Johnson, the obvious tone of their conversation about obtain ng a load of diesal oil suggested the deal was not legitimate. In later conversations, Johnson even inquired of Conroy if the deals on fuel oil Conroy was obtaining were legitimate and, when told they were not, urged Conroy to get some legitimate deals going, although Johnson never instructed Conroy to cease the illegitimate activities.

Similarly, the record reveals in the first conversations between Conroy and defendant Samora and between Conroy and defendant Towery that both defendants, drivers for Mock Petroleum, seemed fully aware of the nature of the offer they were making to Conroy, i.e., to deliver to him a stolen load of fuel oil. Admittedly

Conroy let it be known he was "back in the business,"admittedly he paid Tommy Shelton a "commission" of $100 for each driver Shelton introduced to Conroy, and Conroy clearly asked Land (the defendant who pleaded guilty) and defendant Samora on several occasions whether "Rollie" (defendant Towery's CB nickname) was going to participate. However, this constituted nothing more than providing an opportunity to commit crime, permissible in any of the cases reviewed, and not the outrageous government conduct which constitutes a due process violation and requires reversal of the conviction.

We therefore reject the arguments of defendants Johnson and Towery on this issue.

III. Trial Court's Comments to Jurors.*

Conroy, the first prosecution witness, was sworn and began testimony on February 3, 1983. The jury was ints ructed and

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*See footnote on page 1, ante.

began deliberations on Wednesday, April 26. On Wednesday, May 3, the trial court received a note signed by the foreman stating, "Judge Bianchi, we have reached a verdict on the charges against Johnson and Norris but we cannot agree on a unanimous verdict regarding

Samora and Towery. The point of dissention [sic] is the issue of entrapment." The judge then said to trial counsel, "I am going to bring the jury back and find out if there is anything that we could do to assist them on their deadlock if there is any more re-reading of the testimony or playing tapes that would assist or maybe referring to the instructions." Defendant Samora now contends the trial court committed prejudicial error in failing to reinstruct the jury on the issue of entrapment and in expressing to the jury

its opinion that further deliberations would be helpful. Both contentions are without merit.

Defendant Samora argues that the jury asked for assistance on the law of entrapment, following which the judge inquired into the nature of the deadlock and never reread the entrapment instructions to the jury. This misstates the record. As pointed out above, the note sent in from the jury indicated that the point on which the jury could not agree was the issue of entrapment, and in this regard, the following exchange occurred:

"THE COURT: Is there anything that the Court could do to assist you or help you with your deliberations, such as sending in some of the evidence or letting you listen to some more tapes that were introduced as part of the evidence or having testimony reread to you?

"THE FOREMAN: The only thing that we all think might help would be on the

entrapment law.

"THE COURT: All I could do is to refer you back to the re-reading of the instruction on entrapment.

"THE FOREMAN: That is what we were planning on.

"THE COURT: You have the instructions and you have reread them?

"THE FOREMAN: Yes."

Thus it seems evident from the record that the jury had been given the instructions in written form; the judge referred them back to the instructions on entrapment, and the foreman indicated they were planning to review those instructions. There was no specific request to have the instruction reread by the trial court, nor did the foreman of the jury ask for clarification in addition to the instruction. Thus, the record refutes defendant Samora's claim of error.

Secondly, defendant Samora contends the trial court's inquiry of eight jury

members concerning the nature of the deadlock and their opinion as to whether it was a "hopeless" one constituted "a subtle but effective 'dynamite' insruction." In response to questioning by the trial court, the jury foreman stated that five to six ballots had been taken on defendants Samora and Towery, and the count stood nine to three as to each defendant. The trial court and the jury foreman then engaged in the following remarks:

"THE COURT: Well, I will ask you this qeustion [sic], Madam Foreperson, are you indicating to the Court that it is your considered judgment that the jury is hopelessly deadlocked as to Mr. Towery and Mr. Samora and that you think that further deliberations would not bring about a verdict in this case?

"THE FOREMAN: That is my feeling.

"THE COURT: Well, we had --

"THE FOREMAN: But it has been a long trial.

"THE COURT: I know that we had a long trial and I know that you have been out a long time and relatively speaking, for the amount of evidence, and the issues, but you have not really been out a long time because an ordinarily short case that would have taken a week or two, you have been out a long time, but not for a long case such as we have had here with as much evidence as we have had in this case."

The court then inquired of seven more jurors, three of whom agreed with the foreman that the jury's deadlock was hopeless and four of whom believed that further deliberations would be helpful regarding defendants Samora and Towery. The court then said, "Gentlemen, I don't feel that we should go through the rest of the jurors and I think that under the circumstances the Court has to send the jurors back for another go-around and further deliberations." At the request of one juror and with the concurrence of the

foreman, the court sent the jury home an hour early that evening so they could get a fresh start in the morning. The jury was instructed to return at 9:30 a.m., and the record suggests that the jury had reached a verdict as to defendant Samora sometime before 10:30 a.m. the following day, finding defendant Samora not guilty of conspiracy but guilty of six counts of grand theft. (The jury had still not reached a verdict as to defendant Towery and returned for further deliberations after rendering their verdicts on defendants Johnson, Norris and Samora.)

Defendant Samora bases his objection to the trial court's remarks on People v. Gainer (1977) 19 Cal.3d 835 in which the California Supreme Court rejected for use in California the so-called "Allen charge" to a deadlocked jury. (Allen v. United States (1896) 164 U.S. 492.) The Supreme Court concluded in People v. Gainer, supra, at page 852:

"To summarize our conclusions thus far, both controversial features of the Allen-type charge discussed herein inject extraneous and improper considerations into the jury's debates. We therefore hold it is error for a trial court to give an instruction which either (1) encourages jurors to consider the numerical division or preponderance of opinion of the jury in forming or reexamining their views on the issues before them; or (2) states or implies that if the jury fails to agree the case will necessarily to be retried."

Nothing in People v. Gainer, supra, requires a trial court to accept without question a pronouncement by the jury or by one or more jurors that they are hopelessly deadlocked. The Supreme Court noted in a footnote the American Bar Association Standard concerning length of deliberations of deadlocked jury, to wit: "(b) If it appears to the court that the jury has been unable to agree, the court

may require the jury to continue their deliberations and may give or repeat an instructioin as provided in subsection (a). The court shall not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals." (People v. Gainer, supra, at p. 847, fn. 9, citing ABA Project on Minimum Standards for Criminal Justice, Stds. Relating to Trial by Jury (Approved Draft 1968) std. 5.4, subd. (b).)

We do not agree with the characterization by defendant Samora that the court's inquiry in the instant case had an impact on the jury similar to the Allen-type charge condemned in People v. Gainer, supra. In People v. Cole (1982) 31 Cal.3d 568 the Supreme Court rejected an argument, based in part on People v. Gainer, supra, that the court had placed undue pressure on the jury to reach a verdict. The Supreme Court noted that the

trial court's instruction to the jury to return after the weekend and continue deliberation did not encourage the jury to consider "their numerical division or other implication that the case would necessarily be retried if the jury failed to agree. Thus, the mere direction to the jury to return for further deliberation cannot be said to have imposed 'such pressure on jurors to reach a verdict that we are uncertain of the accuracy and integrity of the jury's stated conclusion.' [Citation omitted.]" (People v. Cole, supra, at p. 582; see also People v. Duran (1983) 140 Cal.App.3d 485;People v. Meza (1981) 116 Cal.App.3d 988, 996.)

Here, the trial court's inquiry did not focus the jury's attention on the numerical split, nor did the trial court in any way suggest that this inordinately long trial would have to be retried if the jury did not reach a verdict. We find nothing in the court's inquiry to the jury

foreman or to the seven other jurors who were polled to indicate that pressure was put on this jury to reach a verdict such that this court should doubt the accuracy and integrity of the jury's conclusion. Defendant Samora's argument to the contrary is without merit.

IV. Stolen Property Convictions of Defendant Johnson.

Defendant Johnson contends the highest crime for which he could have been convicted was an attempt to receive stolen property since the oil stolen by the Mock Petroleum Company drivers was, in effect, "recovered" by Conroy, as an agent of law enforcement, and therefore lost its character as stolen property. The People counter that neither the police nor Conroy ever actually recovered or had possession of the stolen oil and therefore the oil which had been stolen from Mock Petroleum, for example, was still stolen property when it was delivered to British Petroleum

Company and payment made to defendant Johnson.

We have found no California case squarely addressing the issue thus presented, i.e., whether use by law enforcement of a "feigned accomplice" in an ongoing undercover operation involving theft divests the stolen property of its "stolen" character so that it is factually impossible for the ultimate receiver to do more than attempt to receive stolen property. Defendant Johnson relies upon the line of California cases originating with People v. Camodeca (1959) 52 Cal.2d 142 which supports a finding of criminal liability for an attempted offense when the actual commission of the offense is thwarted because some fact or circumstance is unknown or misunderstood by the actor. Of particular significance to defendant's argument is the decision of the California Supreme Court two years later in which the court rejected a defendant's contention

that he could not be convicted of attempting to receive stolen property because the property he received was property the police had recovered. In People v. Rojas (1961) 55 Cal.2d 252, 257-258, the court stated in part:

". . . [T]he defendants had the specific intent to commit the substantive offense and . . . under the circumstances as the defendants reasonably saw them they did the acts necessary to consummate the substantive offense; but because of circumstances unknown to defendants, essential elements of the substantive crime were lacking. . . .

"In the case at bench the criminality of the attempt is not destroyed by the fact that the goods, having been recovered by the commendably alert and efficient action of the Los Angeles police, had, unknown to defendants, lost their 'stolen' status, . . . In our opinion the consequences of intent and acts such as those

of defendants here should be more serious than pleased amazement that because of the timeliness of the police the projected criminality was not merely detected but also wiped out."

Factually, of course, the instant case differs markedly from People v. Rojas, supra, in which case the police, with no apparent prior knowledge of the criminal activity, arrested one William Hall and seized a large quantity of electrical conduit which had been stolen the previous evening. Hall then told the police about the intended receivers and made arrangements, with knowledge of the police, to proceed with delivery of the stolen conduit, resulting in the arrest and conviction of the defendant and a cohort for receiving stolen property. Since the stolen conduit had been recovered by the police, it was not stolen property at the time it was delivered to the defendant; thus because of cir-

cumstances unknown to the defendant, an essential element of the offense, i.e., the "stolen" character of the conduit, was lacking. The defendants' convictions for receiving stolen property were modified to attempting to receive stolen property.

Analogizing to the facts of Rojas, defendant here argues that the involvement of the police in this protracted "sting" operation gave law enforcement constructive possession of the stolen property sufficient to divestit of its stolen character before it reached British Petroleum. Clearly the crime of theft had been completed when any of the Mock Petroleum drivers involved met with Conroy and transferred a load of stolen fuel oil to a truck under Conroy's control. Moreover, according to Conroy's testimony the police were always near enough to the site of the transfer to permit them to monitor Conroy's conversation with the driver via the Fargo unit. Thus defendant

argues it was unnecessary for the police themselves to actually take physical possession of the stolen fuel oil, merely to release it immediately in order to reach the other end of the illegal operation. Defendant contends the rationale of Rojas was satisfied when the police, with the ability to do so, failed to seize the stolen property and arrest the thief, i.e., the action of law enforcement in this case was the functional equivalent of releasing a thief with the recovered stolen property in order to catch the intended receiver. We disagree.

Although California courts have not addressed this issue, we are guided by decisions of the federal courts and of other state courts which decline to extend the rule discussed above beyond those cases in which the police have actually recaptured stolen goods and held them as agents of the true owner. In United States v. Dove (4th Cir. 1980) 629 F.2d

325, the Federal Bureau of Investigation embarked upon an undercover investigation of trafficking in stolen automobiles. The FBI was aided in its efforts by one Baker (whose alternative to cooperation was prosecution). The FBI set Baker up with a used car lot and maintained surveillance of activity at the car lot as well as frequent contact with and direction to Baker. Baker actually assisted one Hutto in the theft of two bulldozers which Hutto sold to defendant and another; Baker was present at the sales. The FBI had directed Baker to assist Hutto in stealing anything Hutto wanted to steal but not to initiate any criminal activity.

In affirming the defendant's conviction for possession of stolen property, i.e., one of the stolen bulldozers, the court stated in part:

"In applying this body of law we do not pretend that the cases speak with one voice and make inevitable the result we

reach. We look instead to the purpose of the rule and of the distinction between 'recovery' and 'observation.' There must come a time when goods recaptured by the police cease being 'stolen' in contemplation of the law. On the other hand, that principle should not be applied in such a way that 'the difficulties in apprehending criminals in cases such as this would be immeasurably increased, and without reason.' [Citation omitted.]

"With respect to the two bulldozers, we agree . . . that stolen property does not lose that status because of the participation of an undercover agent in the crimes of another. Baker's possession of the bulldozers, whether or not in the immediate presence of Hutto, was not recovery for the owner but part of that criminal design. The conduct of Baker in the theft and sale of the bulldozers should be viewed as a form of observation." (Id., at pp. 328-329.)

(See also United States v. Muzzi (2d Cir. 1982) 676 F.2d 919; State v. Overton (1965) 2 Ariz.App. 376, 409 P.2d 92.)

The facts in United States v. Dove, supra, are so like those ofthe instant case we find its reasoning persuasive. Like large scale trafficking in stolen automobiles in Dove, thefts from the oil-fields in Kern County had reached such proportions at the time of Conroy'sinitial arrest (see People v. Kellett, supra, 134 Cal.App.3d 949), Sergeant Condon headed a special taskforce devoted to thiscrime. The nature of the offense involved financial backers on the one hand willing to put up the money to purchase stolen oil and driversfor refineries on the other hand willing to steal the oil in the first instance. The effectively disrupt this type of criminality, the police must reachtoward both ends of the chain. Removing one or two dishonest dirvers of aresting one financial backer will do

little, if anything, to put a stop to the ongoing criminal conduct. It is precisely the nature of this criminal activity which justifies the police involving themselves in it surreptitiously or thorugh informer/agents and in permitting criminal conduct to be carried on for almost two months. Were police activity like this unnecessary to disrupty a large crime ring, this court might be faced with the kind of outrageous government involvement which would constitute the deprivation of due process discussed above.

Moreover, the particular facts of this criminal enterprise highlight the unnecessarily increased difficulties which would be faced by law enforcement were this court to accept defendant Johnson's analogy to the rationale of People v. Rojas, supra. This is not a case where the police were merely interested in arresting a "fence" who would himself receive and take possession of the stolen property.

Johnson had no interest in fuel oil, he had no use for it in his business, and there was never any contemplation that Johnson would receive, hold, or conceal the actual property. Defendant Johnson's only interest was in the profit to be made from selling the fuel oil. His criminal activity was directed to that end. Whether or not the police knew of Johnson's complicity in the scheme, proof of his involvement required them to permit the stolen fuel oil to proceed to its intended destination. Like the activities of the FBI in United States v. Dove, supra, the police in this case merely observed the stolen property incident to the ongoing investigation; like theactivities of Baker, the "agent" in Dove, Conroy's involvement was not recovery of the oil on behalf of the rightful owner, Mock Petroleum, but was part and parcel of defendant Johnson's criminal design.

Finally, we note that the rule of

People v. Rojas, supra, reduces the degree of criminal responsibility for a receiver of stolen but recovered property not because the perpetrator's culpability is lessened but because the legal doctrine of factual impossibility is lessened but because the legal doctrine of factual impossibility compels the result. In the more common setting when the thief is apprehended with the goods after the theft and subsequently cooperates with the police to catch the intended receiver, the diminished criminal liability of the receiver, compelled by a settled rule of law, does not offend our sense of equal treatment for persons equally culpable. However, when, as in the instant case, the receiver and the thief are caught in the same net, application of the rule urged by defendant Johnson would leave us with this anomaly: Since no doctrine of "factual impossibility" operates to reduce the crime of grand theft to an attempt when

law enforcement, for legitimate purposes, knows of but fails to stop commission of theoffense, Johnson's codefendants, the Mock Petroleum drivers Towery and Samora remain fully liable for their criminal actions. Johnson, however, would receive the benefit of this legal doctrine, lessening his criminal responsibility from that of receiver of stolen property to merely one who attempted to commit the offense, despite his obvious role as the linchpin of this entire criminal enterprise. Nothing in established law reuires us to reach such an inequitable result.

We therefore conclude defendant Johnson was properly convicted of receiving stolen property.

V. Jury Instruction on Aiding and Abetting.*

Defendant Johnson contends the trial court gave an erroneous instruction to the jury defining criminal liability as an

*See footnote on page 1, ante.

aider and abettor. This case was tried before our Supreme Court's decision in People v. Beeman (1984) 35 Cal.3d 547, which held that CALJIC No. 3.01 as then written inadequately definined "aiding and abetting because it fails to insure that an aider and abettor will be found to have the required mental state with regard to his or her own act." (Id., at p. 560.) Without the benefit of the decision of Beeman, the trial court instructed with the form of CALJIC No. 3.01 disapproved in Beeman, which read: "In the crimes of theft and receiving stolen property a person aids and abets the commission of said crime if, with knowledge of the unlawful purpose of the perpetrator of the crime, he aids, promotes, encourages or instigates by act or advice the commission of such crime."

The necessary mental element defined by the Supreme Court and then lacking from CALJIC No. 3.01 as given is that "an aider

and abettor act with knowledge of the criminal purpose of the perpetrator and

with an intent or purpose either of commiting, or of encouraging or facilitating commission of, the offense. [Citations omitted.]" (People v. Beeman, supra, at p. 560.) The court in Beeman outlined what should be included in the instruction: "We suggest that an appropriate instruction should inform thejury that a person aids and abets the commission of a crime when he or she, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime." (Id., at p. 561.)

Defendant Johnson argues that the jury in the instant case was not instructed on the necessity of finding he intended to aid and abet the receipt of stolen property and furthermore that "[i]t is undisputed that at no time did defendant actually receive the stolen property and that the only theory of culpability on defendant's part was an aider and abettor." We disagree with defendant Johnson's characterization ofthe theory on which he was found guilty.

We agree there is no indicating in the record that defendant Johnson ever took actual possession or custody ofthe stolen fuel oil. However, the record also makes clear that Johnson's participation was purposeful and pervasive. Johnson directed Conroy to locate stolen diesel fuel available for less than fair market value, and Johnson gave Conroy case to complete these deals, i.e., the purchases were not through the company's bookkeeper.

When a refinery driver contacted Conroy about a load of stolen fuel oil to sell, Johnson provided not only thecase to acquire the load but also the trucking equipment to physically accomplish the transfer. Johnson furnished blank paperwork with the Johnson Brothers Trucking letterhead for Conroy's use in selling the stolen fuel oil. Payment for the stolen oil was made to Johnson in accordance with the bills of lading. Defendant Johnson's only interest in the fuel oil was the proceeds which could be gleaned from its sale. Thus it appears Johnson's involvement in this criminal enterprise was accomplished in exactly the manner he intended by precisely those actions he performed, i.e., furnishing money and equipment as needed to Conroy so that Conroy could pay truck drivers for stolen fuel oil and arrange the sale of the fuel oil to an innocent purchaser with payment made directly to defendant Johnson.

Two distinct principles of law come together under these particular facts to establish defendant Johnson's liability as a principal, and not as an aider and abettor. First, physical possessino of stolen property is not required to establish liability under the statute so long as the facts indicate the defendant exercised the degree of control necessary to constitute constructive possession. (See, e.g., In re Richard T. (1978) 79 Cal.App.3d 382, 387-388.) This is consistent with CALJIC No. 1.24 (4th ed. 1979) with which the jury in the instant case was instructed and which defines constructive possession as follows, "[a] person who, although not in actual possession, knowingly had the right of control over a thing, either directly or through another person or persons, is then in constructive possession of it." Thus, when fuel oil was stolen and sold for the ultimate economic benefit of defendant Johnson pur-

suant to his instructions to Conroy, Johnson had constructive possession of the fuel oil and was in receipt of stolen porperty within the menaing of section 496.

The second theory at issue here centers around Conroy's involvement in the transaction. The facts make clear it was Conroy who was in direct contact with the Mock Petroleum drivers, who supervised the transfer of the fuel from Mock Petroeum trucks to trucks controlled by defendand Johnson, and who handled the sale of the stolen fuel oil to British Petroleum, directing them to pay defendant Johnson. Defendant Johnson argues that, at most, he aided and abetted in the receipt of stolen property, i.e., fuel oil; the People contend these facts established Conroy was acting as Johnson's agent, making defendant Johnson liable directly as a principal.

In his reply brief defendant Johnson

has pointed out that the tort doctrine of respondeat superior is inappliable to hold an employer criminally liable for theacts of an employee, relying upon 1 Witkin, California Crimes (1963) Introduction, section 48, page 50. However, defendant conveniently overlooks section 47 of the same text which sttaes, "One may be a principal, in the criminal law sense, where he directly authorizes or otherwise causes a crime to be committed through the instrumentality of an innocent agent. [Citations omitted.]" (Id., at pp. 49-50.) Because Conroy was an agent of the police during the time of his participation in these events, Conroy was "innocent" as a matter of law, i.e., he was not subject to criminal prosecution for his participation. However, as Perkins points out in his work on criminal law, the distinction regarding an "innocent" agent arose from the common law when use of "guilty" agent rendered the

principal an accessor before the fact. (Perkins on Criminal Law (2d ed. 1969) Parties to Crime, ch. 6, sec. 8, pp. 654-655.) With specific reference to agency, Perkins also states, "One may incur criminal guilt buy procuring the harm to be done by the hand of another whether that other is also culpable or acts as an innocent agent." (Id., at p. 636; see also People v. Williams (1977) 75 Cal.App.3d 731, 744-745.) Thus, accepting Conroy was defendant Johnson's agent Johnson was a principal in receiving stolen property directly and not vicariously on a theory of aiding and abetting the commission of the offense.

Even if we were to assume that defendant Johnson's liability was baed on a theory of aiding and abetting, any error in giving a pre-Beeman form CALJIC No. 3.01 was harmless. As the Supreme Court pointed out in People v. Caldwell (1984) 36 |Cal.3d 210, 224, giving an erroneous

instruction on the intent required of an aider and abettor "did not [necessarily] preclude the jury from considering and determining the question of [the defendant's] intent." Here defendant was charged with conspiracy to commit grand theft, as well as 12 counts of grand theft and 12 counts of receiving stolen property. The jury was properly instructed that the charges of grand theft and those of receiving stolen property were in the alternative. More importantly, the jury was given the following instructions in connection both with Conroy's involvement and with the conspiracy: "When a person acts as a police agent for the purpose of apprehending another believed to be bent on crime, and to that end pretends to be an accomplice of the suspect, no act done by the police agent may be imputed to or held against the suspect unless the latter, <u>in exercise of his independent will</u>, directs

that the act be done.

". . . . . .

"As charged in Count 1 of the Information, a conspiracy is an agreement entered into between two or more persons with the specific intent to agree to commit the public offense of grand theft followed by an overt act committed in this state by one or more the parties for the purpose of accomplishing the object of the agreement. Conspiracy is a crime."

No argument is made that the jury was improperly or incorrectly instructed on the law concerning police agents cr on the law regarding conspiracy. Thus, when the jury found defendant Johnson guilty of conspiracy, they necessarily found that he acted intentionally. We therefore conclude, even if the theory of defendant Johnson's liability was that of aiding and abetting, any error in giving the form of CALJIC No. 3.01 disapproved by the Supreme Court in People v. Beeman, supra, does not

require reversal. The jury necessarily found, pursuant to other, properly given instructions, that defendant had the required intent.

VI. Evidence of Other "Crimes" Committed by Defendant Johnson.

Defendant Johnson contends the trial court violated the provisions of Evidence Code section 1101 in permitting the jury to hear evidence of other "crimes" he allegedly committed, specifically other acts of oil theft or attempted oil theft. The evidence was introduced by way of tape recordings made by the informant, Conroy. The jury could reasonably infer from that evidence: (1) defendant Johnson had solicited the acquisition of stolen diesel fuel, (2) defendant Johnson acquired stolen fuel oil from Roman Oil in Bakersfield in January 1982, and (3) on several occasions an attempted transfer of stolen fuel oil from a Mock Petroleum truch to a truck controlled by defendant

Johnson was unsuccessful, i.e., Johnson in fact acquired no stolen fuel because of some intervening difficulty such as a mechanical problem in the pumping apparatus.

Defendant Johnson now argues this evidence should not have been admitted under Evidence Code section 1101 since it sell within no exception to that statute and was offered only to show his disposition to commit the criminal acts with which he was charged. Johnson also claims this evidence forced him to defend against uncharged offenses as well as those comprising the information, and it was merely cumulative to evidence presented to the jury relevant to the criminal charges actually pending against defendant.

Evidence Code section 1101 provides: "(a) Except as provided in this section and in Sections 1102 and 1103, evidence of a person's character or a trait of his character (whether in the form of an

opinion, evidence of reputation, or evidence of specific instances of his conduct) is inadmissible when offered to prove his conduct on specified occasion.

"(b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident) other than his disposition to commit such acts.

". . . . . ."

Defendant's argument on this issue is long and he cites a great deal of case authority in support of his position; however, his failure to discuss the recent Supreme Court case of People v. Tassell (1984) 36 Cal.3d 77 and those cases considering the relationship of Evidence Code section 1101 to a charge of conspiracy demonstrates the lack of legal support for defendant's contention and the propriety

of the trial court's ruling on the admissibility of other "crimes" evidence. As the People point out, the evidence about which defendant now complains is not necessarily that of other crimes since no charges had actually been filed. However, whether these events constituted crimes, uncharged offenses, or merely other acts, is irrelevant, since the evidence was clearly admissible to establish the "common scheme or design" which necessarily underlies a charge of conspiracy.

The Supreme Court in People v. Tassell, supra, 36 Cal.3d 77 rejected use of the "common scheme or design" exception to Evidence Code section 1101 when common scheme is not at issue and the purported exception "is really nothing but the bestowing of a respectable label on a disreputable basis for admissibility--the defendant's disposition." (Id., at p. 84.) However, the court went on in a footnote to recognize that the "common

scheme or plan" exception is permissibly used when "the speaker [is] referring to a conspiracy, conception or plot to commit the charged offense as well as the uncharged one." (Id., at p. 84, fn. 4; People v. Skelton (1980) 109 Cal.App.3d 691, 715.)

In a similar vein, the court in People v. Cooks (1983) 141 Cal.App.3d 224, 313-314, stated:

"The settled law is, however, that in a prosecution for conspiracy, evidence of uncharged crimes may be admissible as proof of the common design or plan of the conspiracy. [Citations omitted.] . . . In contrast to cases where evidence of uncharged crimes committed by the defendants is offered to prove, by inference, an element of the substantive (charged) crime, such as intent or identity (modus operandi) [citations omitted], in a conspiracy case uncharged crimes may be direct proof of an essential element of

the crime of conspiracy itself, namely, overt acts in furtherance of the conspiracy [citations omitted]." (Fn. omitted.)

Thus, regardless of the characterization of the prior acts, the totality of the evidence introduced against defendant Johnson did not violate the proscription of Evidence code section 1101. Evidence that defendant Johnson was interested in obtaining stolen diesel fuel through Conroy, evidence that he purchased stolen fuel oil from Roman Oil, or evidence that certain attempts to obtain stolen fuel oil from Mock Petroleum drivers were frustrated is all circumstantial evidence of the ongoing conspiracy to steal oil products whether diesel oil or fuel oil, for the personal gain of defendant Johnson and the other conspirators. Moreover, since circumstantial evidence of a conspiracy may properly encompass acts beyond those charged in the information, defen-

dant Johnson's contention that such evidence is merely cumulative is without merit. Thus, the trial court did not err in admitting the evidence in the first instance.

Defendant Johnson also contends the trial court erred in instructing the jury as to the purposes for which they might consider evidence of other crimes. uncharged offenses, or simply acts. The record reflects the People's request for CALJIC No. 2.50 (4th ed. 1979) Evidence of Other Offenses. On April 18, 1983, the court and all counsel, outside the presence of the jury, summarized the result of an off-the-record conference on jury instructions. The trial court stated in part:

"When we got down to 2.50 it was offered by the People and Samora objected to it, Johnson, Norris and Towery. The People and Samora have withdrawn 2.50. 2.50, I believe, talks about the instruc-

tion on uncharged crimes so at this moment the Court is not giving it because it is not asked for. It was offered and objected to and withdrawn. I assume that no counsel at this time wants that instruction."

However, the record also indicates that defendant Johnson requested a modified version of CALJIC No. 2.50, specifically focusing upon the attempts to obtain stolen diesel oil and the purchase of stolen fuel oil from Roman Oil. Immediatley prior to instruction of the jury, the following exchange occurred:

"MR. LONG [for defendant Johnson]: I didn't know whether we were on the record before but apparently, if my memory is correct, your Honor allowed me a modification of an instruction which is entitled Long's four. It is either Johnson's four or Long's four.

"The court allowed the prosecution to tack on that last sentence.

"THE COURT: Evidence may be considered by you if you deem relevant?

"MR. LONG: Right.

"I just want to make sure I got the record squared away. If I brought this up before, please stop me, but I just want to insure because we will be leaving the record soon.

"For the record I believe at that time I did object to the prosecution inserting the last sentence. It is my understanding that your Honor overruled my objection and is allowing that sentence.

"MR. DAVIS [for the People]: Your Honor, I have some comments I would like to make.

"In regard to this instruction that Mr. Long has just alluded to it should be noted that the People offered CALJIC 2.50 which is the correct one, in my opinion, that should have been given.

"However, in lieu of that and in accordance with the court's pretrial ruling

that the state of mind dialogue on the diesel would be admissible, that's why I argued it."

The instruction actually given to the jury was:

"You are hereby instructed that you have heard conversations between some defendants and police informant David Conroy concerning diesel fuel. You are hereby instructed that defendants are not charged with any crimes involving diesel fuel or petroleum products from Roman Oil Company.

"You are further instructed that any such evidence cannot, and must not be used in any way by you as evidence of said defendants' bad character, or as evidence concerning defendants' propensity or likelihood to commit any crime. Said evidence may be considered by you if you deem it relevant."

Defendant Johnson contends specifically the trial court's inclusion of the

last line, "Said evidence may be considered by you if you deem it relevant," was error. He argues the addition of this sentence left the jury to"guess and speculate as to the relevancy of such evidence. Furthermore, it is not known how the jury considered this evidence." Defendant Johnson then argues the jury might have deemed the evidence relevant and used it to either corroborate Conroy's testimony or to establish a motive for defendant Johnson's participation in the conspiracy. The blatant fallacy of defendant's argument, however, is apparent when one looks to the text of CALJIC No. 2.50, to which defendant objected and which the People then withdrew. Both corroboration of a witness' testimony and establishment of motive are listed in that instruction as permissible factors which evidence of other cimes may tend to show. The fact that the approved form of CALJIC No. 2.50 was not given does not render the uses to

which evidence of other crimes may be put, as listed in that section, impermissible.

The complete circuity of defendant Johnson's argument is apparent in his response to respondent's claim that any error was "invited" when defendant Johnson objected to the giving of CALJIC No. 2.50 and instead offered the instruction discussed above. Defendant Johnson argues the error was not in his modification but in the addition requested by the People and in the trial court's subsequent failure "to articulate the pertinent issues to which the evidence of 'other crimes' was relevant." However, it is those particular pertinent issues which are spelled out in CALJIC No. 2.50, to which defendant objected; it seems defendant is arguing the trial court should have engaged in the futile act of reviewing issues Johnson had already successfully objected to once. Under the particular facts of this case, any error in

jury instructions was invited by defense counsel in objecting, apparently in toto, to the giving of CALJIC No. 2.50 instead of requesting modification of that instruction to focus on those "pertinent issues" to which defendant believed evidence of other "crimes" was relevant.

Finally even were there error in the trial court's modification of defendant Johnson's special instruction at eh People's request, any error was harmless beyond a reasonable doubt. The harm to be avoided in Evidence Code section 1101 is that the jury will consider evidence of other crimes, uncharged offenses, or acts similar to those for which the defendant is on trial as evidence of the defendant's bad character or disposition to criminal conduct. In giving the modification requested by defendant Johnson in the instant case, the jury was expressly instructed that they could <u>not</u> consider evidence of attempts to steal diesel fuel

or the purchase of stolen ruel oil from Roman Oil for the prohibited purposes. Thus, further instructing the jury that they could only consider such evidence if they deemed it relevant, notwithstanding any narrowing or further description of "relevant," cannot operate to undo the specific instruction the jury was given, i.e., any determination of relevance made by the jury could not impinge on those prohibited areas of bad conduct or disposition to criminal behavior.

We therefore conclude the trial court did not err in instructing the jury on evidence of other "crimes."

VII. Recusal of District Attorney.

Defendant Johnson next contends the trial court erred in denying his motion to recuse Deputy District Attorney Davis on the ground that the prosecuting attorney was a "major percipient witness" to conversations with the informant, Conroy, concerning not only promises to Conroy

that he would not go to state prison if he cooperated with the police but also the "immunity" granted to Conroy for up to 100 other felony oil thefts. The trial court denied the motion following a hearing, characterized by the reporter as a "mini-trial," at which the informant, Conroy, testified to substantially the same events he would later recount at trial; at this hearing, Conroy was cross-examined by counsel for all defendants, including Land who later pleaded guilty. The only other witness to testify at this hearing was the president of Mock Petroleum, Bryan Mock.

Significantly, in making his motion counsel for defendant Johnson said, "[i]f we are going to get into that [presumably the felonies for which Conroy was given "immunity"], and if the prosecution is pushing that with this court, then unfortunately he is going to be a witness. If he is going to be a witness, that changes the posture of this trial." (Emphasis

added.) Defense counsel also argued that if the prosecutor and Conroy had some kind of an agreement to "get" codefendant Johnson, he would have the right to call the prosecuting attorney as a witness. After hearing Conroy's testimony, the trial court denied the motion to recuse Deputy District Attorney Davis.

It is now well settled that the trial court, in the exercise of its discretion, may recuse the prosecutor in a criminal case because of a conflict of interest (see, e.g., People v. Superior Court (Martin) (1979) 98 Cal.App.3d 515, 519-521), or may under appropriate circumstances recuse the entire office of the district attorney to avoid even the appearance of impropriety or a conflict of interest. (See, e.g., People v. Superior Court (Greer) (1977) 19 Cal.3d 255, 266-269; Donovan, Prosecutorial and Judicial Misconduct (Cont.Ed.Bar 1979) Prosecutorial Misconduct, sec. 1.28, pp.

32-33, and (1983 supp.) sec. 1.28, pp. 9-11.)

Moreover, it is equally clear that the possibility a prosecutor may be called as a witness may constitute grounds for recusing that prosecutor from trying the case, a result consistent with both the American Bar Association, Code of Professional Responsibility, Disciplinary Rule 5-102 (B) and the California State Bar Rules of Professional Conduct, rule 2-111(A)(5). (See generally Comden v. Superior Court (1978) 20 Cal.3d 906, 913-915; People v. Superior Court (Hollenbeck) (1978) 84 Cal.App.3d 491, 500-502.) However, as the court pointed out in People v. Superior Court (Hollenbeck), supra, one of the underlying rationales warranting recusal of a district attorney who might also be called upon to testify, i.e., the possibilty his testimony would be considered more credible than that of the ordinary witness by a jury, clearly is

inapplicable when a prosecutor is required to testify at a pretrial hearing before only the trial court.

Under the facts of this case, defendant Johnson has not shown the trial court abused its discretion in denying his motion to recuse Deputy District Attorney Davis. Most significant is the failure of defendant Johnson to examine the deputy district attorney at the pretrial hearing held, in part, for the express purpose of acquainting the trial court with facts justifying recusal. Although defendant Johnson contends in his brief he cannot speculate about Davis' testimony had Davis been called at trial, this ignores his chance to explore Davis' possible testimony prior to trial to avoid defendant's highly speculative contention on appeal that Davis might have been a percipient witness whose testimony would have benefited defendant Johnson.

The informant's testimony at the

pretrial hearing was internally consistent and was consistent with his testimony at trial. Conroy denied on cross-examination that Davis had promised him he would not go to state prison if he cooperated with the police; Conroy testified Davis promised to "go to bat" for him and recommend a county jail sentence, but Davis made clear to Conroy that the sentencing decision would rest exclusively in the hands of the trial judge. With respect to the 100 possible felony charges, about which the police apparently lacked evidence, if not knowledge, prior to Conroy's visit and offer of cooperation, Conroy testified Davis told him that he, Conroy, would not be prosecuted for any of the offenses he recounted to the police, although this protection did not extend to offenses which went unreported. Conroy was cross-examined at trial about his deal with law enforcement and the prosecution, and the jury was made fully aware of his

marked self-interest in testifying. There is nothing in the record to suggest Davis would have been required to impeach Conroy's trial testimony since Conroy acknowledged the deal he made, nor was there any evidence presented at the pretrial hearing to suggest Conroy was not disclosing the full extent of the consideration afforded to him.

Apart from such impeachment or mere corroboration, defendant Johnson has failed to suggest any area in which the prosecutor might have been a necessary, percipient witness such that the trial court's denial of defendant's motion to recuse constituted an abuse of discretion. We therefore conclude there was no such abuse.

VIII. Prosecutorial Misconduct.

The last issue asserted by defendant Johnson concerning the guilt phase of his trial alleges prosecutorial misconduct in (1) filing a charge of conspiracy the

prosecutor knew was unfounded and (2) knowingly introducing perjured testimony. Both contentions are totally without merit and deserve little discussion.

Defendant Johnson's contention that the prosecutor filed a charge of conspiracy he knew was unwarranted rests upon Johnson's theory that there was no conspiracy, an argument which has been discussed in detail above. Defendant Johnson ignores the jury's conviction of him of conspiracy. It was the jury's failure to find any of his codefendants guilty of the same charge that prompted the trial court to grant defendant Johnson a new trial on the issue, after which the People dismissed this charge. There is absolutely nothing in this set of facts to suggest the prosecutor was acting in bad faith when he filed the conspiracy charge, and we find no merit in defendant Johnson's argument.

Secondly, defendant Johnson urges that

the prosecutor knowingly used perjured testimony, specifically Conroy's explanation of a "Rosemary Woods-like" gap in one of the tape recordings. Conroy testified the gap was the result of the microphone attached to his telephone falling off when he, Conroy, leaned back in his chair. Defendant Johnson presented an expert who testified the gap could not have happended consistent with Conroy's explanation. As the Attorney General capable points out, this is nothing more than a conflict in testimony particularly within the province of the trier of fact. More importantly, with respect to defendant Johnson's charge of prosecutorial misconduct, even were this court to assume that Conroy had perjured himself in explaining the gap in the tape, there is nothing whatsoever in the record to suggest that the prosecutor knew Conroy's testimony in this regard was false. Thus, like defendant Johnson's first contention, his second ground for

asserting prosecutorial misconduct is meritless.

IX. Sentencing errors.

A. Defendant Johnson.

Defendant Johnson contends the trial court erred (1) in denying probation, (2) in imposing the aggravated term as the principal term, and (3) in imposing consecutive sentences.

Defendant Johnson's argument concerning the trialcourt's denial of probation focuses on the trial court's comments that the purpose of the determinate sentencing law is deterrence and uniformity of sentencing, and that punishment is the deterrent. He points out that section 1170, subdivision (a)(2), provides in pertinent part, ". . . Nothing in this article shall affect any provision of law which imposes the death penalty, which authorizes or restricts the granting of probation or suspending the execution or imposition of sentence, or expressly

provides for imprisonment in the state prison for life. . . ." (Emphasis added.) Defendant Johnson also cites the Advisory Committee Comment to California Rules of Court, rule 414,8/concerning the criteria affecting probation, which states:

"The sentencing judge's discretioin to grant probation is unaffected by the Uniform Determinate Sentencing Act (sec. 1170(a)(2)).

"The decision whether to grant probation is normally based on an overall evaluation of the likelihood that the defendant will live successfully in the general community. Each criterion points to evidence that the likelihood of success is great or small. A single criterion will rarely be determinative; in most cases, the sentencing judge will have to balance favorable and unfavorable facts.

"Under criterion (d)(3) ('willingness and ability') it is appropriate to consider the defendant's expressions of will-

ingness to comply and their apparent sincerity, and whether the defendant's home and work environment and primary associates will be supportive of his efforts to comply with the terms of probation, among other factors."

Defendant Johnson's argument is that the trial court's consideration in his case of punishment as a deterrent, when deterrence is the specific purpose of the Determinate Sentencing Act, shows the trial court abused its discretion in denying him probation, notwithstanding the court's simultaneous recognition that defendant satisfied many of the individualized criteria enumerated in rule 414.

With respect to granting or denying probation following conviction of a felony, section 1203, subdivision (b), provides in pertinent part, ". . . If the court determines that there are circumstances in mitigation of the punishment

prescribed by law or that the ends of justice would be served by granting probation to the person, it may place the person on probation. . . ." It is now well settled that "[t]he granting or denial of probation is a matter for the discretion of the trial court. [Citation omitted.]" (People v. Bolton (1979) 23 Cal.3d 208, 216.) This discretion, although broad, is not absolute. It can be "neither arbitrary nor capricious, but is an impartial discretion, guided and controlled by fixed legal principles, to be exercised in conformity with the spirit of the law, and in a manner to subserve and not to impede or defeat the ends of substantial justice. [Citations omitted.]" (People v. Warner (1978) 20 Cal.3d 678, 683; see also People v. Bolton, supra, at p. 216; People v. Roe (1983) 148 Cal.App.3d 112, 118-119.)

As the People point out, the trial court's consideration of the deterrent effect of punishment was not the sole

criterion on which it denied defendant Johnson probation. In denying probation the court also considered the number of offenses for which defendant Johnson had been convicted, i.e., 12 counts of receiving stolen property, and indicated his belief that the number of counts was an important factor. Moreover, the court stated:

"So because Mr. Johnson was really a focal point of the whole operation, he put up the front money, whether the initial idea came from Conroy or not, he's shrewd. He was willing to accept the plan, assuming it came from Conroy, as long as he made the profit. As it turned out, according to his testimony on evidence, it wasn't all that profitable. Nevertheless, that's not a consideration for the Court.

"If he were told in the beginning that the profits would be what he purports the evidence shows, he's shrewd enough, I'm sure, that he would never have gotten in-

volved in the first place. He drew five men into this scheme. Numbers of them have been sentenced to prison, I believe, four."

The trial court's remarks when considered as a whole show that it very carefully considered criteria pertinent to defendant Johnson in denying probation, including the fact that the alternative plan proposed did not appear to contemplate the deterrent effect of punishment. Moreover, defendant's argument that such a consideration is beyond the appropriate rules of court ignores rule 410, concerning general objectives in sentencing. Those general objectives include "(a) Protecting society. [Par.] (b) Punishing the defendant. [Par.] (c) Encouraging the defendant to lead a law abiding life in the future and deterring him from future offenses. [Par.] (d) Deterring others from criminal conduct by demonstrating its consequences. [Par.] .

. ."

Rule 410 concludes:

"Because in some instances these objectives may suggest inconsistent dispositions, the sentencing judge shall consider which objectives are of primary importance in the particular case.

"The sentencing judge should be guided by statutory statements of policy, the criteria in these rules, and the facts and circumstances of the case."

Additionally, defendant Johnson's argument that consideration of punishment as a deterrent is inapporpriate ignores the recent decision of People v. Levingston (1982) 136 Cal.App.3d 724. There the defendant had argued the trial judge abandoned the principles of individualized sentencing when he considered the effect lenient treatment of the defendant's conduct might have on society. The defendant had been convicted in 1977 but fled prior to sentencing; in the interim between his

flight and his sentencing in 1981, the defendant apparently led a crime-free life. Nonetheless, in following the original recommendation that defendant be sentenced to prison, the trial court noted "'it would be establishing a very dangerous precedent for all defendants out on bail to think they can become fugitives, and later come in and say they hadn't been in trouble.'" (Id., at p. 728.) In affirming, the appellate court said:

"In the instant case, the dialogue shows that the court did not abandon individualized sentencing; instead, it carefully considered appellant's background, the offense involved, and the original probation report, and then deliberately based its decision on these factors. The judge's additional comments explaining rejection of the appellant's unusual claim for leniency properly considered the effect a reduced punishment would have on society. Clemency because of good conduct

during flight would not only fail to deter others from similar behavior, but would encourage it and could seriously undermine the effectiveness of the law enforcement process. Since the court based its sentencing decision on appellant's character and behavior before his flight, it complied with the principles of individualized sentencing; its additional comments regarding a contrary decision were entirely appropriate and fulfilled legitimate objectives of the sentencing procedure. [Citation omitted.]" (Id., at p. 731.)

A similar rationale shows the trial court here did not abuse its discretion in denying probation. It properly considered the number of offenses of which defendant Johnson had been convicted and his focal role in the commission of those offenses. The court appropriately stated: "If a person of means could get involved in, say, an occasional swipe with the oil

industry, and a little skimming here and there, although by comparison it would be relatively small, and end up with a tired old phrase of 'slap on the wrist,' return the loot, and be on probation, I don't know how many other people might be induced to participate or try something similar since the consequences are not all that great."

Defendant Johnson also challenges his sentence on the ground that the trial court erred (1) in imposing the aggravated term and (2) in imposing consecutive sentences. To the extent the trial court considered the crime to be one involving a taking of great monetary value, within the meaning of rule 421(a)(10), it does appear defendant is correct in his assertion that the amount paid for the load of fuel oil stolen on November 28, 1982, forming the basis for count III of the information and constituting the principal term, was $2,783.69 instead of the $3,500 figure

referred to by the trial court at sentencing. Despite the discrepancy between these two figures of approximately $7,000, we are unwilling to state that $2,700 is not "great monetary value" as a matter of law. Moreover, the court also stated it was imposing the aggravated term because (1) defendant occupied a position of leadership in the enterprise, provided the money for the enterprise, and made a profit from the criminal activity and (2) the crime involved premeditation. Because "[s]entencing courts have wide discretion in weighing aggravating and mitigating factors [citation omitted] and may balance them against each other in qualitative as well as quantitative terms [citation omitted]" (People v. Roe (1983) 148 Cal.App.3d 112, 119), we find no abuse of the trial court's discretion in the instant case.

Similarly with respect to imposition of consecutive terms, although the People

have conceded that the trial court erred in finding that the crimes involved multiple victims when each offense involved only a single victim (People v. Humphrey (1982) 138 Cal.App.3d 881, 822-883), this was not the only factor relied upon by the trial court. The trial court also observed that (1) the crimes and their objectives were predominantly independent of each other and (2) the crimes were committed at different times and places, rather than indicating a single period of aberrant behavior. Again, under the particular facts of this case, we do not find the trial court abused its discretion in imposing consecutive terms.

Defendant Johnson's sentence is affirmed.

B. Defendant Towery.

Defendant Towery contends the trial court improperly rejected as a condition in mitigation the fact that he was induced to participate in the crime. Rule

423(a)(5) does recognize as a circumstance in mitigation that "[a] defendant with no apparent predisposition to do so was induced by others to participate in the crime." The trial court addressed this factor in denying probation and stated, "Although the probation officer mentions that a circumstance in mitigation is that he [Towery] was induced by another, he did willingly participate. The choice was his."

"There is no requirement the court indicate its reasons for rejecting a mitigating factor." (People v. Davis (1980) 103 Cal.App.3d 270, 281.) The evidence in this case fully supports the trial court's determination that Towery's participation was willing and an exercise of his free will. While others may have offered him the opportunity to participate, Towery's interest in the scheme was clearly monetary and self-motivated. The record demonstrates that

the trial court considered the factor of inducement to participate and rejected it. Nothing more is required.

C. Defendant Samora.

Defendant Samora first asserts that the trial court abused its discretion in denying probation. The applicable legal principles were discussed above with respect to defendant Johnson. In denying probation the court noted that defendant Samora was involved in six separate counts and was solely motivated by his desire for monetary gain, not, in the court's opinion, for the necessary support of his family. Samora was extensively involved in an operation encompassing a total large sum of money, the crimes indicated premeditation, and Samora took advantage of his employer's trust. Defendant seems to urge this court to reweigh or recharacterize the factors on which the trial court based its denial of probation (e.g., that the money was needed to repay back

taxes equates to necessary support of the family); that is not the function of this court. The standard in reviewing a denial of probation is whether the trial court abused its discretion, and under the facts of this case as stated by the trial court, we find no such abuse.

Defendant Samora also contends the trial court erred in imposing consecutive terms on three of the six counts of which he was convicted, resulting in a total term of imprisonment of three years and four months. Concerning mitigating and aggravating factors, the court stated its feeling "there is a fair balance, that one does not exceed the other. That's the reason for selecting the mid term." The court's stated reasons for selecting consecutive sentences were: "one . . . the crimes involved the actual taking of property of great monetary value, and, two, the crimes were committed at different times and separate places, rather

than being committed so closely in time and place to indicate a single theory [sic.] period of aberrant behavior."

Like other sentencing decisions, the imposition of consecutive sentences is largely a matter within the discretion of the trial court, guided by the appropriate Rules of Court. Moreover, case law establishes that the separate and distict nature of numerous crimes for which the defendant is convicted will sustain the imposition of consecutive sentences. As the court stated in People v. Savala (1983) 147 Cal.App.3d 63, 71, "Under the rules of court the more separate and distinct one crime is from another the more justified will be a consecutive sentence." Notwithstanding defendant Samora's argument that all of the crimes for which he was convicted occurred within a period of one and a half months, they were clearly separate and distinct acts of theft. In these circumstances, we conclude that the

trial court did not abuse its discretion in imposing consecutive sentences on three of the six counts of which defendant was convicted. (See also People v. Weaver (1984) 151 Cal.App.3d 592, 596-597.)

The judgments as to all defendants are affirmed.

HAMLIN, Acting P.J.

WE CONCUR:

MARTIN, J.

RITCHEY, J.*

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*Assigned by the Chairperson of the Judicial Council.

FOOTNOTES

1/ All further statutory references are to the Penal Code unless otherwise indicated.

2/ Details of the offenses for which Conroy was convicted, which appear to be identical to the offenses for which these defendants were prosecuted, can be found in this court's opinion in People v. Kellett (1982) 134 Cal.App.3d 949. Kellett was Conroy's codefendant whose four-year state prison sentence was affirmed.

3/ During this meeting and all subsequent face-to-face encounters with any defendants, Conroy was wearing a "Fargo" recording device to tape-record the conversation. Telephone conversations were recorded at Conroy's home utililzing his personal recording equipment. All tapes, telephone or Fargo, were turned over to Sergeant Condon.

4/ This rule is consistent with the federal rule as an exception to the general requirement that wire taps must be authorized by a warrant. (See 18 U.S.C.A. Sections 2510-2520, dealing generally with wire interception and interception of oral communications.) Although defendant Samora contends the tape recordings in the instant case violate these federal statutes, this contention ignores the express provision of 18 United States Code Annotated section 2511(2)(c), which provides, "It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception." (See also People v. Montgomery (1976) 61

Cal.App.3d 718, 731.)

5/ "Q. Is it true that those other one or two informants who did use the phone to make phone calls for tape recording purposes called from the Sheriff's Department Office rather than from their home?

"A. It's from the office or a location where we were and could tape record off of that phone, yes.

"Q. So, in other words, those particular instances you had control over not only what the person was saying, right?

"A. Yes.

"Q. You also had immediate control of the tape so that it couldn't be altered, erased or in any way defaced. Isn't that true?

"A. That's true.

"Q. Most probably you could have a better quality of tape using your equipment under controlled circumstances where like Mr. Conroy in his own home he has children there that are possibly running in and out and so forth?

"MR. DAVIS: Objection. Assuming evidence not in evidence. Speculative and not relevant.

"THE COURT: Sustained.

"MR. HUFFMAN: Q. Why was it in this particular case that you decided to allow Mr. Conroy to make his own tape recordings at home rather than doing it as you had in the past from the Sheriff's Offices?

"A. Well, this was going to be a different type of circumstance and when he

received phone calls which he did, he definitely couldn't use the Sheriff's Office number to reach him at and the second thing is he was making phone calls in the morning, noon and night from his residence and it just really wasn't feasible to set him up an office or telephone at the Sheriff's Office to be utilized for these tape recordings.

"Q. Okay. Now, I can understand incoming calls be required to be going through his phone but the outgoing calls, the Sheriff's Department is open 24 hours a day, is it not?

"A. That's correct.

"Q. Okay. If you were not yourself personally on duty, there are other officers who could be given instructions that, hey, if Mr. Conroy wants to make a phone call, make sure it is properly recorded and give me a tape later. You could have done that?

"A. You could take people from other assignments and have them come in to do that but that's not normal. That would not be normal procedure.

"Q. But we don't always have to go by normal procedure, do we?

"A. I try to as much as you can with the informant.

"Q. What I am saying is it was possible that on outgoing calls all of those could have been monitored by the Sheriff's Department by having him call from the Sheriff's Department. Isn't that correct?

"A. It's possible. It just wasn't feasible and it was not desirable from our standpoint."

6/ Our review of the record establishes that although Johnson may have talked only to Conroy, the other charged coconspirators did talk to one another. On those occasions when an actual transfer of stolen fuel oil was made, the Fargo Recordings show that, e.g., on December 17, 1981, Conroy, Norris, and defendant Samora talked together while a load of oil was being pumped from Samora's truck to that of Norris; on January 3, 1982, a similar coversation was recorded between Conroy, Norris, and defendant Towery.

7/ "For all the foregoing reasons we hold that the proper test of entrapment in California is the following: was the conduct of the law enforcement agency likely to induce a normally law-abiding person to commit the offense? For the purposes of this test, we presume that such a person would normally resist the temptation to commit a crime presented by the simple opportunity to act unlawfully. Official conduct that does no more than offer that opportunity to the suspect-- for example, a decoy program--is therefore permissible; but it is impermissible for the police or their agents to pressure the suspect by overbearing conduct such a badgering, cajolling, importuning, or ther affirmative acts likely to induce a normally law-abiding person to commit the crime." (Ibid., fn. omitted.)

8/ West's Annotated Civil and Criminal Rules, California Rules of Court, rule 414, page 672.

All further references to rules are to the California Rules of Court.

IN THE COURT OF APPEAL OF THE STATE OF

CALIFORNIA FIFTH APPELLATE DISTRICT

Filed December 24, 1985
Kevin A. Swanson, Clerk

THE PEOPLE,	
Plaintiff and Respondent,	5 Crim. No. F002863
v.	(Kern Co. Super. Ct.
JERRY TOWERY, et al.,	No. 23702)
Defendants and Appellants.	ORDER MODIFYING OPINION AND DENYING REHEARING

IT IS ORDERED that the opinion filed herein on November 25, 1985, and reported in the Official Reports (____ Cal.App.3d ____) be modified in the following particulars:

1. On page [7], on the [first] line [at] the [top] add a period after the word "Johnson" and delete the balance of the sentence so the sentence reads:

During the operation with defendant Johnson, Conroy opened a checking account in the name of Fuel Movers at the request of Defendant Johnson.

2. On page [26], line[s] [20 and 21], delete the words "independent control" and replace with the words "police supervision" so the sentence reads:

Defendants contend this lack of police supervision over the recordings should render them inadmissible.

3. On page [40], add the following to the first full paragraph which ends on line [20]:

Moreover, to the extent the recordings contained statements by Conroy himself which expressly or impliedly named defendant Johnson as the man behind the operation, any arguable error by the trial court in failing to delete these comments in order to preserve the sense of the entire conversation does not demand reversal. Given the weight of the evidence against defendant Johnson, it is not reasonably probable a result more favorable to him would have been reached if Conroy's inculpatory statements had

been deleted. (People v. Watson (1956) 46 Cal.2d 818.)

4. On page [118], line [4], delete the figure $7,000.00 and substitute for it the figure $700.00 so the sentence reads:

Despite the discrepancy between these two figures of approximately $700.00, we are unwilling to state that $2,700.00 is not "great monetary value" as a matter of law.

Defendant Lail Johnson's petition for rehearing is denied.

HAMLIN, Acting P.J.

I CONCUR:

MARTIN J.

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE

COURT OF APPEAL

5th District, No. F002863

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

IN BANK

Filed March 12, 1986
Lawrence P. Gill, Clerk

PEOPLE

v.

JERRY TOWERY et al.

Appellants' petitions for review DENIED.

BIRD, Chief Justice

PROOF OF SERVICE
(Certificate)

I, ARTHUR DUDLEY, a member of the Bar of the Supreme Court of the United States and counsel of record for Lail Johnson, petitioner herein, hereby certify that on May 8, 1986, pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the foregoing Petition for Writ of Certiorari on each of the parties herein, as follows:

On the State of California, respondent herein, by depositing such copies in the United States Post Office, City of Santa Cruz, State of California, with first class postage prepaid, properly addressed to the post office address of John K. De Kamp, the Attorney General of the State of California, the above-named respondent's counsel of record, at 1515 K Street, Suite 511, Sacramento, California 95814.

All parties required to be served have been served.

Dated: May 8, 1986

ARTHUR DUDLEY
105 Soquel Avenue
Santa Cruz, CA 95060